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No. 01 456 SEP 17 2001

IN THE

Supreme Court of the United States

HOLLAND AMERICA LINE-WESTOURS, INC.,
Petitioner,

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in relying on a presumption of irreparable harm in determining whether to award injunctive relief for a violation of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, (NEPA) in light of the Court's opinion in *Amoco Production Company v. Village of Gambell*, 480 U.S. 531 (1987), in which the Court specifically rejected the Ninth Circuit's previous use of such a presumption.

2. Whether, upon reversing the district court's decision on the merits and holding that the Park Service had permitted additional vessel entries into Glacier Bay in violation of NEPA, the Ninth Circuit erred in enjoining the additional entries, where the district court had not first considered the issue of injunctive relief, and no hearing was held to determine whether irreparable harm from the additional vessel entries existed, or was likely.

3. Whether the Ninth Circuit erred in enjoining additional vessel entries into Glacier Bay, more than five years after the entries had been permitted and commenced, where the movant never presented evidence of actual or imminent physical irreparable harm to the environment or the wildlife from the increase in vessel entry quotas, and the record before the court of appeals contained no such evidence.

4. Whether the Ninth Circuit erred in enjoining additional vessel entries without requiring movant to produce evidence of actual or imminent harm to the environment from the NEPA violation, i.e. the failure to prepare an EIS, and whether respondent NPCA's failure to move for injunctive relief for nearly three years after the challenged activities were authorized would vitiate such harm, and further whether the extensive ongoing monitoring and control exercised by the National Park Service over vessel traffic in Glacier Bay would vitiate such harm.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner is Holland America Line-Westours, Inc. Pursuant to Supreme Court Rule 29.6, petitioner Holland America Line-Westours, Inc. is a Washington state corporation, which is a 100% subsidiary of Holland America Line-USA Inc., a Delaware corporation, which is a 100% subsidiary of Holland America Overseas B.V., a Dutch corporation, which is a 100% subsidiary of HAL Buitenland B.V., a Dutch corporation, which is a 100% subsidiary of HAL Antillen N.V., a Netherlands Antilles corporation, which is a 100% subsidiary of Carnival Corporation, a Panamanian Corporation located in Miami, Florida. Carnival is a publicly owned corporation, traded on the New York Stock Exchange, with a controlling interest (~47%) of the stock owned by members or affiliates of the Arison family.

The Respondents are:
National Parks and Conservation Association
Gale Norton, Secretary of the Interior
Robert Stanton, Director, National Park Service

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 241 F.3d 722 (9th Cir. 2001). (App. 1a-31a). The order of the court of appeals denying petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is unreported. (App. 34a). The order of the district court granting summary judgment in favor of defendants is unreported. (App. 35a-70a). The order of the district court entering the injunction against defendants on remand is unreported. (App. 73a).

JURISDICTION

On February 23, 2001, the court of appeals entered its opinion and judgment reversing the district court's order granting summary judgment to defendants, and remanding the case with instructions to the district court to enjoin implementation of certain provisions of the 1996 Vessel Management Plan for Glacier Bay National Park and Preserve pending completion of an Environmental Impact Statement. (App. 1a). On May 18, 2001, the court of appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 34a). On August 8, 2001, Justice O'Connor extended the time for filing a petition for a writ of certiorari until September 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, provides in relevant part that federal agencies shall: "include in every

recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . . ." 42 U.S.C. § 4332(2)(C).

The vessel management regulations for Glacier Bay National Park and Preserve, 36 C.F.R. § 13.65(b) (1996), are set forth in the appendix to this petition at 74a-87a.

STATEMENT OF THE CASE

This case concerns the National Park Service's management of marine traffic in Glacier Bay within Glacier Bay National Park and Preserve (GBNPP), in southeast Alaska. Watercraft—cruise ships, tour boats, charter boats, and private boats—are the primary means of access to features of interest in GBNPP. Most people visit Glacier Bay by cruise ship. Vessel operators generally must obtain entry permits to enter Glacier Bay from the National Park Service (Park Service). 36 C.F.R. § 13.65(b)(2). In 1996, the Park Service adopted a new Vessel Management Plan (VMP) and implementing regulations, 36 C.F.R. § 13.65(b), which permitted increases in existing vessel entry quotas, and added additional operating restrictions and special-use closures to protect the marine resources of GBNPP. The VMP resulted from a five year process under NEPA, during which the Park Service consulted with the National Marine Fisheries Service (NMFS), reviewed scores of scientific studies, promulgated an environmental assessment in excess of 300 pages analyzing six alternatives, and held six hearings in Alaska. 61 Fed. Reg. 27,008-27,009 (1996). The court of appeals reversed the district court's determination that the Park Service complied with NEPA when it adopted the VMP, on the ground that the Park Service's failure to prepare an EIS violated Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994). (App. 32a). Although the district court had not

addressed the issue, the court of appeals ruled in favor of NPCA on the issue of injunctive relief, and remanded the case to the district court with instructions to enjoin additional vessel entries authorized since 1996 by the VMP pending preparation of an EIS. (App. 1a-31a).

The VMP provides for vessel entry quotas by vessel type, one of which is "cruise ships." 36 C.F.R. § 13.65(b)(2)(v). Petitioner has operated cruise ships in Glacier Bay for decades, and holds cruise ship entry permits issued under the VMP regulations. The VMP limits daily cruise ship entries into Glacier Bay to two per day year-round, and imposes an additional limit on the total number of "seasonal" entries, i.e. entries occurring during the summer season, from June 1 to August 31. 61 Fed. Reg. 27,014. The VMP raised the maximum number of seasonal entries for cruise ships in 1996 from 107 to 139, an increase of 32 entries or 30%. *Id.* Further increases up to a total of 184 entries were authorized subject to certain conditions beginning in 1998. *Id.* 36 C.F.R. § 13.65(b)(2)(v)(B).

Petitioner was awarded the majority of the 32 additional entry permits issued by the Park Service in 1996. Notwithstanding the authority to raise cruise ship entries for the summer season from 139 to 184, the Park Service has not raised the level of entries above 139. The quota has remained at 139 from 1996 until August 3, 2001, when it was reduced by the injunction entered in this case. (App. 73a). As a result of the injunction, five cruise ships operated by petitioner which had been scheduled to call on Glacier Bay between August 3, and August 31, 2001, had to be diverted to avoid Glacier Bay, and the travel plans of thousands of petitioner's passengers were disrupted.

I. DEVELOPMENT OF THE MANAGEMENT REGIME FOR VESSEL TRAFFIC IN GBNPP.

Until the 1970's, vessel use of Glacier Bay was unregulated, and vessel traffic in Glacier Bay consisted

primarily of fishing vessels. In the 1970's, however, Glacier Bay experienced a surge in vessel use from both small craft and large ships. As vessel use of the marine areas of the GBNPP increased, the Park Service's concern for the potential impacts to wildlife, and especially to the humpback whales which frequent Glacier Bay in summer, also increased. Glacier Bay is within the summer range of the North Pacific humpback whale, an endangered species.

Systematic documentation of the whales began in the 1970's, and research regarding the behavioral response of whales to vessel activity began in 1976 pursuant to a Park Service contract. From 1973 until 1982, the total number of whales observed in Glacier Bay during the summer months ranged from 10 to 24. In 1978, many of the whales departed unusually early, and, in 1979, relatively few visited Glacier Bay. The reduction in whale visits in 1978 and 1979 caused concern that vessel traffic may have caused the reduction. Heedful of this possibility, the Park Service imposed vessel operating guidelines in 1979. The Park Service also requested formal consultation with NMFS pursuant to Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §1536, regarding management of marine traffic in Glacier Bay.

NMFS issued its first biological opinion regarding vessel traffic in Glacier Bay in 1979. 49 Fed. Reg. 15,493 (1984). NMFS concluded that uncontrolled increases in vessel traffic, particularly charter/pleasure craft (which travel erratically, as opposed to cruise ships which travel at a constant speed and course) were likely to jeopardize the humpback whales. *Id.* at 15,494. NMFS also acknowledged that the whales may depart due to changes in prey availability. *Id.* In its opinion, NMFS recommended restriction of vessel use in Glacier Bay, implementation of regulations governing routing and maneuvering, monitoring of the humpback population, and research into prey distribution, acoustic environment, and whale behavior. *Id.*

As a result, in 1980, the Park Service adopted formal regulations restricting vessel traffic in Glacier Bay through quotas, with a seasonal maximum for cruise ships of 107 entries in 1980, and 89 entries in 1981 and 1982. 45 Fed. Reg. 32,228 (1980) (codified at 36 C.F.R. § 7.23(c) (1980)). The regulations also imposed restrictions on routing and maneuvering of vessels to minimize whale-vessel interactions. 36 C.F.R. § 7.23(d) (1980). The Park Service research and monitoring which followed indicated that there was considerable natural variation in prey availability, and that although vessels could cause whales to alter their behavior on a short-term basis, slow moving vessel traffic did not prevent whales from using an area. In 1983, NMFS issued a second biological opinion, and concluded that "some increase in the amount of vessel use can occur without jeopardizing the continued existence of the Southeast Alaska whale stock, provided increases are implemented in a conservative manner and with an appropriate monitoring program." 49 Fed. Reg. 15,486 (1984). In 1984, the Park Service proposed regulations establishing a permitting system for vessel entries, including cruise ships, using 1976 entry figures as a base (89 seasonal entries for cruise ships) with incremental increases allowed (up to 107 seasonal entries) for cruise ships so long as the whale population remained at 1982 levels (22 whales). *Id.* at 15,482. The regulations also provided for vessel operating restrictions and a mechanism for designating "whale waters" closures. *Id.* at 15,484. The regulations were formally adopted in 1985, and remained in place until the VMP which is the subject of this action was adopted in 1996. The quota for cruise ships reached the authorized maximum of 107 seasonal entries in 1988, with a maximum of two entries per day, where it remained until the challenged VMP authorized an increase to 139 seasonal entries in 1996.

II. FORMULATION OF THE 1996 VESSEL MANAGEMENT PLAN.

Pursuant to its statutory mandate, the Park Service has sought to balance environmental concerns with a growing public demand to experience the spectacular wilderness setting and abundant wildlife of Glacier Bay. In 1991, the Park Service undertook a review of vessel entries into Glacier Bay in light of increased demand for visitation. The Park Service re-initiated consultation with NMFS, and commenced a draft environmental assessment (EA)[1] pursuant to NEPA, in which it initially identified four possible alternatives. On February 19, 1993, NMFS issued its third biological opinion discussing the potential effect of additional vessel entries into Glacier Bay on humpback whales.[2] Despite the continued scientific research, NMFS concluded that the impact of any increased vessel traffic remained inconclusive. Nonetheless, it opined that even the highest entry increase proposed in the draft EA (77 additional entries, for a total of 184 seasonal cruise ship entries) would not likely jeopardize the existence of the Northern Pacific humpback whale. In light of the uncertainty, however, NMFS urged the Park Service to adopt a conservative approach to the VMP. In response, the Park Service added alternatives to its EA, included a number of

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[1] Pursuant to NEPA, agencies must prepare an EA to assess the environmental effects for each project that may be subject to NEPA's EIS requirements. From the EA, the agency determines whether the project will "significantly affect" the environment, and thus whether an EIS is necessary. 40 C.F.R. §§ 1501.4 and 1502.3.

[2] NMFS identified three endangered or threatened species that might be found within Glacier Bay; the Stellar Sea Lion, the Gray Whale, and the Humpback Whale. NMFS concluded that there were no Stellar Sea Lion rookeries in Glacier Bay, only haulouts, and that the Park Service's proposed actions would not adversely affect the existence or recovery of the Stellar Sea Lions which had been delisted from the endangered species. NMFS also noted that Gray Whales rarely entered Glacier Bay and were not affected by vessel traffic.

measures to mitigate potential adverse effects, and provided for further research. In May, 1995, the Park Service published the VMP and EA, a document in excess of 300 pages in length, which discussed the environmental effects of each of the proposed six alternatives, as well as the proposed rule. The Park Service designated Alternative Five, which permitted an additional 77 seasonal cruise ship entries up to a total of 184 entries, as its proposed action. 60 Fed. Reg. 29,523 (1995).

The Park Service held six hearings on its proposal, and based upon responses received to the EA, it revised Alternative Five to limit the number of immediate additional seasonal cruise ship entries to 32 (for a total of 139), with subsequent increases permitted up to a total of 184. 61 Fed. Reg. 27,008-27,009 (1996). On March 20, 1996, the Park Service published its revised Alternative Five and its Finding of No Significant Impact. It concluded that the additional vessel entries with the mitigation measures authorized in its preferred alternative would not significantly affect the environment and declined to prepare an environmental impact statement. In May, 1996, the VMP regulations became final. *Id.* at 27,008. The quotas for seasonal vessel entries were increased, with seasonal cruise ship entries being raised by 30% to 139. *Id.* at 27,014.

III. PROCEEDINGS IN THE DISTRICT COURT.

NPCA brought this action on May 2, 1997, under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, for judicial review of the Park Service's decision to adopt the 1996 VMP without first preparing an EIS. Federal question jurisdiction exists pursuant to 28 U.S.C. § 1331. NPCA sought a declaratory judgment that the VMP was adopted in violation of NEPA, and a permanent injunction prohibiting all additional vessel entries authorized by the VMP until an EIS was prepared. NPCA never sought temporary or preliminary injunctive relief. On March 3, 1998, the district

court granted petitioner the right to intervene to protect its rights as a cruise ship operator holding many of the additional entries allowed under the 1996 VMP.[3]

In October, 1998, two and a half years after publication of the rule permitting additional entries, NPCA filed its motion for summary judgment in the district court to establish that the Park Service violated NEPA when it adopted the VMP without first preparing an EIS. NPCA argued that an EIS was required because of the uncertainty over the effects of the VMP on wildlife, and because of public opposition to the increase in entries. Petitioner and the Park Service filed cross motions for summary judgment to establish that the Park Service had complied with NEPA. Petitioner also sought to dismiss NPCA's claims for injunctive relief for lack of any showing by NPCA of irreparable harm to the environment. NPCA presented no evidence that the quota increases presented an immediate, actual threat to the environment or the whales, despite the passage of three cruise seasons (1996-1998) in which the additional 32 entries had been permitted and extensive monitoring had occurred. Petitioner introduced National Park Service whale population studies from 1996 and 1997 showing that the number of whales in Glacier Bay had increased, not decreased, since the additional entries had been permitted.

Relying primarily upon *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993), the district court granted the Park Service's motion for summary judgment that it had complied with NEPA. (App. 52a-56a). The district court denied NPCA's motion for summary judgment, and denied petitioner's motion for summary judgment as moot. (App.

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[3] Petitioner and the federal defendants have different interests in this litigation, as the district court observed. Petitioner's lies primarily in the issue of whether vessel activities authorized under the VMP should be enjoined, as compared to federal defendants' which are concerned with the scope of the procedural obligations imposed by NEPA.

70a). The district court held that even if scientific uncertainty remained after the "hard look" required by NEPA, where the uncertainty results from a "genuine lack of scientific consensus" and the agency's conclusions are based on substantial, though not dispositive, data, the agency was entitled to resolve conflicting opinions by relying on its experts. (App. 55a). It concluded that the Park Service had reasonably interpreted the administrative record, and was not required to prepare an EIS. (App. 68-69). The district court never reached the issue of injunctive relief.

IV. THE DECISION OF THE COURT OF APPEALS.

NPCA appealed the entry of summary judgment, and petitioner cross-appealed the district court's denial of its cross-motion on the remedies issue. NPCA barely mentioned injunctive relief in its opening brief, and produced no evidence of the effects of the additional 32 cruise ship entries, despite the passage of four post-VMP cruise seasons by the time it submitted its briefs. In its opposition, petitioner opposed NPCA's request for a permanent injunction on the ground that NPCA had failed to meet its burden of demonstrating the requisite irreparable harm. In the alternative, petitioner asked the court of appeals to remand the remedies issue to the district court for an evidentiary hearing on the nature and likelihood of irreparable harm to the environment, and to balance the countervailing equities, including the public's interest in access to Glacier Bay. NPCA likewise asked the court of appeals to remand the question of injunctive relief to the district court.

Petitioner appended Park Service reports summarizing the results of the agency's monitoring of humpback whales in Glacier Bay for 1996-1999, the first four years since vessel quotas were increased.[4] The reports reflect that record

[4] The 1996 and 1997 reports appear in petitioner's excerpt of record. The 1998 and 1999 Park Service reports were included as part of

population increases have occurred in recent years. For example, in 1999, 60 humpback whales were observed in Glacier Bay, as compared to 15 in 1985. According to the Park Service biologists, the record population increases of 1996-1999 contributed to an "increasing trend" from 1985 to 1999, and "reflect a real increase in whale abundance in the study area." 1999 Whale Report, pp. 22-23.[5] These reports constitute empirical evidence of the status of the whale populations in Glacier Bay since adoption of the VMP. In contrast, NPCA never offered any evidence of harm to the environment from the addition of the 32 additional cruise ship entries, much less that such harm was imminent and irreparable. Federal defendants limited their briefing in the court of appeals solely to the merits.

The court of appeals reversed the district court's summary judgment. (App. 1a-31a). The court of appeals did not disagree with the district court that the effects of the additional cruise ship entries were uncertain. (App. 16a-18a). Rather, it held that uncertainty required the Park Service to conduct further scientific studies and to promulgate an EIS before it could allow any additional entries. (App. 18a).

Having found a NEPA violation, the court of appeals turned to NPCA's request for a permanent injunction and announced: "NPCA has made the requisite showing for injunctive relief." (App. 26a). It explained the basis for its holding: "Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement." (App. 27a). It then noted:

Petitioner's Appendix to its Opposition Brief submitted in the Ninth Circuit.

[5] In the 1998 report, Park Service biologists stated: "This increasing trend is substantiated by the finding that mean whale counts for 1985-1991 were significantly lower than mean whale counts for 1992-1998. . . ." 1998 Whale Report, p. 9.

> We have recognized, nevertheless, that in "unusual circumstances" an injunction may be withheld, or more likely, limited in scope. *See Forest Conservation Council*, 66 F.3d at 1496. *Amoco Production Co.* is not to the contrary. There, the Supreme Court rejected a presumption of irreparable injury where an agency failed adequately to investigate the consequences of its proposed action, *see Amoco Prod. Co.*, 480 U. S. at 544-45, 107 S. Ct. 1396: it required courts to undertake the traditional "balance of harms" analysis. *Id.* at 545, 107 S.Ct. 1396. We have fully weighed the competing interests using our traditional equitable jurisdiction, and conclude that injunctive relief is appropriate. Finally, in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), then-Circuit Judge Breyer held that, because NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures. *See id.* at 500 (because NEPA can do no more than require the agency to produce and consider a proper EIS, the harm that NEPA intends to prevent is imposed when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires). *Marsh* also justifies injunctive relief in this case.

(App. 27a).

The court of appeals examined the evidence introduced by petitioner, and concluded it was insufficient to dissuade it from entering the injunction, placing the burden on petitioner to convince the court not to enter the injunction. (App. 28a-29a). The court dismissed the whale census evidence introduced by petitioner as a mere "short term increase," even though the Park Service biologists stated it was a "statistically significant" trend. (App. 29a). The court further noted that petitioner did not address "other environmental effects," besides whales. *Id.* The court of appeals did not

discuss evidence submitted by NPCA on environmental effects of the additional entries because it could not–NPCA did not submit any. The court discounted the impact of the injunction upon petitioner and its passengers because "neither Westours nor those of its passengers who may be unable to view Glacier Bay at the time they originally planned have cause to claim surprise as a result of any injunction." (App. 28a). The court did not address why petitioner's reliance on the district court's decision on the merits was not justified, nor the fact that petitioner must "use or lose" its entry permits.

In its decision the court of appeals focused upon the possibility of harm, rather than actual evidence of physical harm. (App. 27a-28a). The court of appeals stated "[w]hen the 'proposed project may significantly degrade some human environmental factor,' injunctive relief is appropriate," citing *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995). (App. 26a).[6]

The court of appeals acknowledged that the scope of an injunction should be determined by the district court in the first instance, where the question of injunctive relief "raises intensely factual issues." (App. 29a). Nonetheless, it found that in this case there were no "intensely factual issues and the scope of the injunction to which NPCA is entitled is quite plain. It is appropriate, therefore, for us to decide the injunction question on this appeal." *Id.* Thus, after five summer seasons under the 1996 VMP, the Ninth Circuit proceeded to determine the appropriateness of injunctive relief on the sole evidentiary basis of a five year old EA.

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[6] However, *Alaska Wilderness* utilizes the standard of whether "the proposed project may significantly degrade" some environmental factor to determine whether an EIS is required, not to determine if injunctive relief is appropriate. Thus, the court of appeals in this case relied on the test for whether an EIS should be required to determine whether an injunction should be entered.

The court of appeals quoted the statement in *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987), that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable." (App. 26a). Though it thus acknowledged that environmental harm is often irreparable, it did not explain why it considered the harm at issue in this case irreparable.

Indeed, the court of appeals did not identify any specific environmental harm it sought to avoid by entering the injunction. It simply concluded that "Glacier Bay Park is too precious an ecosystem for the Park Service to ignore significant risks to its diverse inhabitants and its fragile atmosphere." (App. 31a). The court defined those risks as increased vessel traffic and its "related disturbances" on the resident wildlife. (App. 8a-9a). Yet, the most that could be said was that the 32 additional entries could or might "affect" the wildlife.[7] *Id.*

The court of appeals held injunctive relief appropriate, remanding the case to the district court with instructions to enjoin all additional vessel entries pending preparation of an EIS.[8] (App. 30a-31a). The court of appeals left it for the district court to determine the effective date of the injunction. (App. 31a). On August 3, 2001, the district court entered the

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[7] The predominant complaint was that the additional entries might create intolerable noise levels for the humpback whales causing them to expend too much energy to avoid the noise, thereby placing the whales themselves at risk, and jeopardizing reproduction.

[8] Though it concluded that the 1996 VMP was void, the Ninth Circuit specifically saved the mitigation measures adopted to mitigate the impact of the additional entries. (App. 29a). These included speed and course restrictions, area limitations, pollution minimization plans, and discretion to restrict entries. The court of appeals severed these parts of the 1996 VMP from the injunction so that those requirements would continue despite having been allegedly enacted in violation of NEPA. *Id.*

injunction, immediately enjoining all additional vessel entries authorized by the VMP pending preparation of an EIS. (App. 73a).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision significantly relaxes the standards in the Ninth Circuit for obtaining injunctive relief in environmental cases. The rule adopted by the court of appeals provides that, absent "unusual circumstances," courts must enjoin governmentally authorized activity whenever a NEPA violation likely exists.[9] The rule clearly conflicts with the Court's holdings in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 541-44 (1987) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), that an injunction does not follow automatically from a finding that an environmental statute has been violated, unless Congress has expressly limited the courts' traditional equitable discretion with respect to remedial relief. Instead, according to the rulings of this Court, the appropriateness of an injunction depends upon a traditional balancing of equities, with attention to the specific policies underlying the statutes in question and the presence or absence of irreparable injury. The court of appeals in this case has rewritten the rules for issuing injunctions in NEPA cases to eliminate the traditional requirement that a party must demonstrate irreparable injury to obtain injunctive relief. Thus, the court of appeals has adopted a rebuttable presumption of irreparable injury and injunctive relief, whenever NEPA is violated.

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[9] In this case, NPCA sought a permanent injunction, and thus the court had to find that a NEPA violation had occurred in order to issue the injunction. However, where a party seeks a preliminary injunction under NEPA, prior to a final determination on the merits, all that party must show is that a NEPA violation likely exists. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

The Court should review the decision of the court of appeals for several reasons. First of all, the decision ignores this Court's explicit rejection of a presumption of irreparable harm in *Village of Gambell*. The decision also conflicts with the decisions of some Ninth Circuit panels and several other circuits. The decision, in addition, misapplies First Circuit precedent as support for its presumption of irreparable harm based upon a violation of NEPA's procedural requirements. Several other circuits have similarly misread the First Circuit decisions as support for a presumption of irreparable harm in NEPA cases. Certiorari is required to resolve these differences, and bring the circuit courts into conformity with the Court's decisions in *Village of Gambell* and *Romero-Barcelo*.

In addition, the decision sets a dangerous precedent for practical reasons. The effect of the presumption adopted by the Ninth Circuit is to shift the burden of persuasion on the question of injunctive relief from the party seeking the injunction to the party opposing the injunction. Consequently, the decision makes it much more difficult for a third party permittee like petitioner, who relies on the government's permitting authority when it invests in and develops a project, and whose interests and project are at stake, to defend against a party seeking an injunction to halt the project. This creates uncertainty for permittees who conduct their activities under the authority of government permits subject to NEPA. Moreover, the decision eliminates the ability of the government, and of third party permittees, to rely upon an environmental assessment under NEPA where there is some uncertainty as to the proposed action's environmental effect. Unless the government prepares an EIS, a single party will be able to halt fishing and logging management, road construction, and a host of other activities authorized by the government, by filing a NEPA action and seeking an injunction.

Finally, as this case demonstrates, the procedure for obtaining injunctive relief in environmental litigation is muddled at best, leaving those parties most affected by the injunction, such as petitioner, to guess how to protect their interests. In this action NPCA was never required to present any evidence of harm, nor were petitioner or the government ever given an opportunity to present the countervailing equities in an evidentiary hearing prior to the Ninth Circuit's ruling granting the injunction. This Court should clarify the procedure to be used by the lower courts when considering injunctive relief in environmental litigation.

I. THE NINTH CIRCUIT'S DECISION IRRECONCILABLY CONFLICTS WITH THE COURT'S HOLDINGS IN *WEINBERGER v. ROMERO-BARCELO* AND *AMOCO PRODUCTION COMPANY v. VILLAGE OF GAMBELL.*

In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-19 (1982) and *Amoco Production Company v. Village of Gambell*, 480 U.S. 531, 541-44 (1987), the Court addressed the issue of injunctive relief in the context of federal environmental litigation. The Court held in each case that a violation of an environmental statute by a federal agency does not automatically warrant an injunction. In *Romero-Barcelo*, the Navy had failed to obtain a discharge permit required by the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251. The First Circuit held there was an "absolute statutory obligation" to stop discharges until the permit was granted. *Romero-Barcelo v. Brown*, 643 F.2d 835, 861 (1st Cir. 1981) *rev'd sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The Court reversed the First Circuit, and explained that a court is not "mechanically obligated to grant an injunction for every violation of law," *Romero-Barcelo*, 456 U.S. at 313. The Court construed the FWPCA, and held that the statute did not usurp judicial discretion to deny injunctive relief. The Court contrasted the provisions of

the FWPCA with the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, where it found that "[t]he purpose and language of the statute . . . not the bare fact of a statutory violation, compelled [entry of an injunction]." *Id.* at 314 (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

The Court concluded, in *Romero-Barcelo*, that even in environmental litigation, injunctions were "not a remedy which issues as of course." *Id.* at 311. Rather, the "basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 312. Thus, *Romero-Barcelo* establishes that a court must engage in traditional equitable balancing before issuing an injunction for violation of an environmental statute, absent statutory language limiting equitable discretion. Moreover, part of the equitable balancing involves determining whether not granting the injunction would result in irreparable injury.

Five years later in *Amoco Production Company v. Village of Gambell, supra*, the Court considered the availability of injunctive relief for a violation of Section 810 of the Alaska Native Claims Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120, which protects Alaska Natives' subsistence use of federal lands. The Secretary of the Interior had granted Amoco oil and gas leases in the Bering Sea on the outer continental shelf of Alaska. The Native villages of Gambell and Stebbins sued to enjoin the leases as issued in violation of ANILCA for failure by the Secretary to consider the impact of the leases on subsistence. The district court denied the Native villages' request for an injunction.

The Ninth Circuit reversed, and announced that "injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances." *People of Village of Gambell v. Hodel*, 774 F.2d 1414, 1423

(9th Cir. 1985), *rev'd sub nom, Amoco Production Company v. Village of Gambell*, 480 U.S. 531 (1987). It phrased its rule, in effect, as a rebuttable presumption. The court found that no unusual circumstances existed in the case, and that injunctive relief was therefore appropriate, notwithstanding a lack of probable irreparable harm to subsistence resources from exploration, and the ability of the Secretary to comply with ANILCA in future review of development and production plans. The court of appeals explained its rationale[10] for the injunction:

> Notwithstanding its determination that the Secretary violated the procedural requirements of section 810(a) of the Conservation Act, the district court denied the Villages' request for a preliminary injunction. The district court's ruling is not consistent with the law of this circuit. An injunction is the appropriate remedy for a substantive procedural violation of an environmental statute. *See Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir.1985). "Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984). In *Save Our Ecosystems v. Clark*, we also noted that "[o]nly in a rare circumstance may a court refuse to issue an injunction when it finds NEPA violation." *Id.* at 1250.

Id. at 1422-1423.

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[10] In a pre-*Village of Gambell* opinion, the Ninth Circuit expounded on the nature of the presumption of irreparable harm in NEPA cases which then-existed in the Ninth Circuit: "The presence of strong NEPA claims gives rise to more liberal standards for granting an injunction. (citations omitted) The premise for relaxing the equitable tests in NEPA cases is that irreparable damage may be implied from the failure of responsible authorities to evaluate thoroughly the environmental impact of a proposed federal action." *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965-66 (9th Cir. 1983).

Relying on *Romero-Barcelo*, the Court, in *Village of Gambell*, overturned the Ninth Circuit's decision. It squarely rejected the court of appeals' reliance on a presumption of irreparable harm:

> The Court of Appeals did not dispute that the Secretary could meaningfully comply with ANILCA Section 810 in conjunction with his review of production and development plans. Instead, the court stated that "[i]rreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action." (citations omitted) This presumption is contrary to traditional equitable principles and has no basis in ANILCA.

480 U.S. at 544-45 (quoting *People of Village of Gambell v. Hodel*, 774 F.2d at 1423).

As NEPA contains no indication that Congress intended to deny the courts traditional equitable discretion with respect to remedial relief for its violation, a presumption of irreparable harm, such as the court of appeals applied in the instant case, is impermissible under *Village of Gambell*. Reliance on such a presumption forecloses the full balancing of the equities which is required for issuance of an injunction.

Some panels of the Ninth Circuit Court of Appeals which have addressed the question of injunctive relief in the context of NEPA litigation have followed the teaching of *Village of Gambell*, and rejected the use of a presumption of irreparable harm. For example, in *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988), the court of appeals held that even where the permitted activities (mining) were going ahead on the basis of a fundamentally flawed EIS, an injunction would not issue automatically because nothing in NEPA mandated such a restriction of judicial discretion: "[NEPA's] high aim 'to create and maintain conditions under which man and nature can exist in productive harmony,' 42

U.S.C. 4331, does not show a congressional intent to foreclose equitable balancing by a court enforcing its requirements." In *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992), the court of appeals held that "[m]erely establishing a procedural violation of NEPA does not compel the issuance of a preliminary injunction." (Citing *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988)). *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995); *Save the Yaak Committee v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). *See also Natural Resources Defense Council v. Texaco Refining & Marketing, Inc.*, 906 F.2d 934, 939-40 (3d Cir. 1990) (citing cases from other circuits).

However, decisions within the circuit are not uniform. Renegade Ninth Circuit decisions (including the decision in the case at bar) exist which embrace a presumption of irreparable harm, notwithstanding the Court's rejection of *Save Our Ecosystems'* presumption of irreparable harm in *Village of Gambell*. Less than a year and a half after the Court's decision in *Village of Gambell*, the presumption of irreparable harm began its resurrection in the Ninth Circuit. In *Conner v. Burford*, 848 F.2d 1441, 1461 (9th Cir. 1988) *cert. denied*, 489, U.S. 1012 (1989), the court of appeals enjoined surface disturbing activities on oil and gas leases until NEPA and the ESA were complied with, citing "*Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (injunction appropriate remedy for violation of NEPA). . . ." In *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), the court of appeals wrote that "the proper remedy for substantial procedural violations of NEPA and the ESA is an injunction." *Id.* at 1230. Like the court of appeals in *Connor*, the court in *Bob Marshall* relied on *Thomas v. Peterson*, which was decided before *Village of Gambell*. *Id.*; *see also Forelaws on Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986).

In 1995, in *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995), the Ninth Circuit again cited *Thomas* for the rule that injunctions remain the appropriate remedy for a violation of NEPA's procedural requirements, "absent 'unusual circumstances.'"[11] Inexplicably, in *Forest Conservation Council*, the court of appeals cites as good law this Court's summary in *Village of Gambell* of Ninth Circuit cases which espoused the presumption of irreparable harm (which this Court then goes on to repudiate). *Id.* Apparently, the court of appeals took the Court's language in *Village of Gambell* out of context. Thus, the court of appeals in *Forest Conservation Council* erroneously resurrects the Ninth Circuit rule on presumption of irreparable harm–the rule that was specifically disavowed by the Court in *Village of Gambell.*

The Ninth Circuit, in the case at bar, relies upon *Forest Conservation Council* for the rule that injunctions remain the proper remedy for NEPA violations absent unusual circumstances. (App. 27a).[12] Hence, the phoenix is reborn as the Ninth Circuit in this case relies on the rule, presumes irreparable harm from procedural error, and orders issuance of an injunction.[13] (App. 26a-31a).

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[11] Thus, *Forest Conservation Council* continues the Ninth Circuit's pre-*Village of Gambell* practice of placing the burden on the party resisting an environmental injunction to present evidence of "unusual circumstances." *See, e.g., Alpine Lakes Protection Soc. v. Schlapfer*, 518 F.2d 1089 (9th Cir. 1975); *American Motorcyclist Assoc. v. Watt*, 714 F.2d 962 (9th Cir. 1983).

[12] Based upon the administrative record, the Ninth Circuit specifically found that "there is a sufficient possibility of environmental harm . . . ." (App. 28a).

[13] Notwithstanding its reliance in the instant case on the presumption of irreparable harm, the Ninth Circuit indicated its awareness of the balancing requirements imposed by *Village of Gambell.* In a footnote it notes that courts are required to "undertake the traditional 'balance of harms' analysis." (App. 27a). Having thus nodded in the direction of this

The resurrection of the presumption of irreparable harm has not gone unnoticed. In *Friends of Mt. Hood v. United States Forest Service*, No. CV 97-1787 KI (D. Or. 2001) the district court considered a preliminary injunction for an alleged NEPA violation. A copy of the unpublished decision is provided together with this petition. That court relied upon the instant case and *Thomas v. Peterson* to conclude that "[a]n injunction may be withheld or limited in scope in the event of 'unusual circumstances,' otherwise an injunction is the appropriate remedy for a violation of NEPA's procedural requirements."[14] *Id.* at 3. The conflict created by the Ninth Circuit's presumption of irreparable harm in NEPA cases warrants review to conform it with the decisions of this Court. [15]

II. THE NINTH CIRCUIT'S DECISION THAT SPECULATIVE AND PROCEDURAL HARMS CONS-TITUTES IRREPARABLE HARM FOR PUR-POSES OF OBTAINING INJUNC-TIVE RELIEF CONFLICTS WITH OTHER CIRCUITS.

The Ninth Circuit's decision also irreconcilably conflicts with a number of decisions from other circuits, and even some Ninth Circuit precedent that injunctive relief is an

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Court's rulings, the court of appeals, with a negligible factual record, summarily states: "[w]e have fully weighed the competing interests using our traditional equitable jurisdiction, and conclude that injunctive relief is appropriate." *Id.*

[14] The Ninth Circuit's rules prohibit citation of unpublished authority. Petititioner does not cite the case for precedential value, but rather to show the impact of the Ninth Circuit's decision in the case at bar.

[15] The Court has not addressed the issue of injunctive relief with respect, specifically, to NEPA. However in *Village of Gambell* the Court specifically repudiated *Save Our Ecosystems*' rule requiring a presumption of irreparable harm for environmental violations. *Save Our Ecosystems* was a NEPA case.

extraordinary equitable remedy available only to prevent actual or imminent irreparable harm, and that speculative allegations of harm will not suffice. Furthermore, the court of appeals in this case misreads case law from the First Circuit to hold that procedural harm to the NEPA process warrants an injunction.

The Second Circuit authorizes injunctive relief in NEPA cases only where threatened irreparable harm is actual and imminent. *Town of Huntington v. Marsh*, 884 F.2d 648, 652 (2nd Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *see also Knowles v. United States Coast Guard*, 924 F. Supp. 593, 602 (S.D.N.Y. 1996). ("The Second Circuit has described irreparable harm as injury that 'is likely and imminent, not remote or speculative, and that . . . is not capable of being fully remedied by money damages.") The Second Circuit addressed the issue of irreparable injury under NEPA in *State of New York v. Nuclear Regulatory Commission*, 550 F.2d 745 (2nd Cir. 1977) where it refused to enjoin air shipment of nuclear materials for an alleged violation of NEPA. The Second Circuit concluded that the alleged environmental harm, the release of radioactive materials into the environment as a result of an accident or terrorism, was not an actual or imminent threat. In contrast to the case at hand, the Second Circuit wrote: "[t]he status quo is destroyed when trees are cut, forests are stripped, soil eroded, and natural wildlife habitat destroyed. The status quo is not destroyed when an aircraft transporting [nuclear materials] rushes down the runway and becomes airborne." *Id.* at 755. *See also Sierra Club v. United States Forest Service*, 843 F.2d 1190, 93-95 (9th Cir. 1988) (clear-cut logging of groves of giant sequoias); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1508 (D. Ore. 1992), *aff'd sub nom. Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) ("Old growth forests are lost for generations, and no amount of monetary compensation can replace the environmental loss."). Thus, even in environmental litigation, "a threat of irreparable

injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of the procedural violations of NEPA." *Town of Huntington v. Marsh*, 884 F.2d at 652.

The court of appeals' decision in this case bypasses the fundamental requirement that the harm to be enjoined must be actual and imminent, rather than speculative. In doing so, it has diverged from the other circuits, and some Ninth Circuit precedent. That precedent holds that while it is not necessary to establish irreparable harm with scientific certainty, it is well settled that "a plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). In its opinion the court of appeals in this case mischaracterized the test from *Alaska Wilderness*, 67 F.3d at 732, for whether an EIS is required, i.e. "when some proposed project may significantly degrade some human environmental factor," as the test for whether an injunction is appropriate. (App. 26a). In so doing, the court of appeals substituted a speculative standard for the requirement that irreparable harm be actual and imminent.

In addition, the court of appeals mistakenly found support for its ruling in the First Circuit's decision in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), which it cited for the proposition that "the requisite harm is the failure to follow the appropriate procedures." (App. 27a). However, in *Sierra Club*, then-Judge Breyer made it clear that the concern in NEPA violations was "harm to the environment," not a "purely legalistic" form of "procedural" harm, that arises automatically when a NEPA violation occurs. *Sierra Club v. Marsh*, 872 F.2d at 504. Thus, the First Circuit required that courts examine whether the harm to the environment from the NEPA violation is irreparable. *Id.* at 503-04. Contrary to the reading given it by the Ninth Circuit, *Sierra Club* rests on harm to the environment that occurs because of what Judge

Breyer called the "bureaucratic steam roller effect," i.e. increased risk that a project will not receive full scrutiny if constructed without full NEPA compliance, owing to the "deeply rooted human psychological instinct not to tear down projects once they are built." *Id.* at 504.

Not only did the court of appeals misread *Sierra Club* to hold that procedural harm suffices for a injunction, the court ignored circumstances in the instant case, as well as limitations to the First Circuit's rule, that would have foreclosed issuance of the injunction in this case in the First Circuit. The First Circuit has recognized that attempting to avoid bureaucratic commitment and momentum by enjoining activities authorized under a defective NEPA document does not make sense where the injunction requested would not be granted for years after those activities have been authorized, precisely the circumstances of the instant case. *Conservation Law Foundation v. Busey*, 79 F.3d 1250 (1st Cir. 1996). Moreover, the VMP at issue here is not a physical structure that would implicate bureaucratic commitment; it is a modifiable set of legal restrictions on ongoing activities of private parties. Indeed, under the VMP, the Park Service retains the authority to alter restrictions at any time if vessel entries prove to injure the environment. 36 C.F.R. § 13.65(b)(v)(D) and (ix).

Other circuits have also misinterpreted the First Circuit decisions to presume irreparable harm from procedural violations of NEPA regardless of the environmental consequences. *Ross v. Federal Highway Administration*, 162 F.3d 1046, 1054 (10th Cir. 1998) ("Courts have routinely recognized the appropriateness of injunctive relief requiring the preparation or completion of an EIS or SEIS"); *Hirt v. Richardson*, 127 F. Supp. 2d 833 (W.D. Mich. 1999); *State of Wisconsin v. Weinberger*, 745 F.2d 412, 432-33 (7th Cir. 1984)(Cudahy, J. dissent) (NEPA does indeed presume that an injunction should issue in an ordinary NEPA violation case"). Commentators have also read the First Circuit's

decisions as support for the proposition that proof of actual harm to the environment is not required in NEPA cases. *See* Rubenstein, *Injunctions Under NEPA After Weinberger v. Romero-Barcelo and Amoco Production Co. v. Village of Gambell*, 5 Wis. Environmental L. J. (1988); Hermann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. Chicago L. Rev. 1263 (1992).

The court of appeals' decision in this case conflicts with the traditional requirements for injunctive relief that the harm to be prevented must be actual, imminent, and irreparable. The decision is also an unwarranted expansion of the First Circuit's holding in *Sierra Club v. Marsh*.

III. THE STANDARDS AND PROCEDURES FOR INJUNCTIVE RELIEF IN NEPA CASES PRESENT AN EXTREMELY IMPORTANT QUESTION.

Almost 20 years after *Romero-Barcelo*, private parties affected by a NEPA challenge still face an *ad hoc* procedure for litigating injunctive relief in environmental litigation. This case well illustrates that point. NPCA, plaintiff below, sought injunctive relief within its complaint, but never placed the question of an injunction squarely at issue before the district court, because it never asked the district court for a temporary restraining order or preliminary injunction. The district court focused on the merits of the NEPA claim, and did not reach the question of injunctive relief. NPCA, therefore, was never required by the district court to prove its case for permanent injunctive relief.

On appeal, NPCA again focused upon the merits, i.e. the Park Service's decision to rely upon the environmental assessment. NPCA was not required to produce any evidence of irreparable harm to either the environment or the Park Service's decision-making process. In an abundance of caution, petitioner did submit the Park Service's annual

studies of humpback whale populations in Glacier Bay for 1996-1999, which showed a "statistically significant" increasing trend in whale populations in recent years. In its opinion, the court of appeals recognized that "where the question of injunctive relief 'raises intensely factual issues,' the scope of the injunction should be determined in the first instance by the district court." (App. 29a). The court, however, was wrong in concluding that this case did not raise such factual issues. *Id.* Here, there was a five year history of actual operations that should have been fully considered in the balancing process. Yet, the totality of the "hearing" on injunctive relief before the court of appeals boiled down to 10 minutes of appellate argument with no ability to present evidence. The only evidence the court appeared to deem relevant in deciding that injunctive relief was appropriate was stale, documentary evidence from an administrative record over five years old.[16]

NEPA litigation is usually contentious, expensive, and often affects millions of dollars. Litigants should not be made to guess as to the procedure to be used for injunctive relief. Rather, injunctions should be issued only after an

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[16] This litigation demonstrates why a remand to the district court for a full evidentiary hearing should be required. Petitioner submitted the evidence concerning the humpback whales because NPCA had focused on that species in its arguments, and because, historically, the Park Service regulations had been developed largely due to the agency's concern over the effects of vessels on that particular species. However, given the application of the Ninth Circuit's presumption "absent unusual circumstances", which shifts the burden of proof to the party resisting entry of an injunction in NEPA cases, when the Ninth Circuit reversed the district court on the district court's conclusion that there was no NEPA violation, petitioner was penalized for not presenting factual evidence to the court of appeals on the full effect of the entries, including their effect on all wildlife species. As a result, whenever a litigant appeals a district court's decision that no NEPA violation occurred, the affected party must adduce all of its evidence to the court of appeals in the event that decision is reversed.

evidentiary hearing and proper findings of fact are entered. In this case, neither happened. The Court should grant certiorari to establish the proper standards and procedure for injunctions in NEPA cases.

CONCLUSION

Almost fifteen years has passed since the Court has addressed the question of injunctive relief in the context of environmental litigation. Since NEPA itself does not provide remedies for its violation, the fashioning of such remedies is exclusively left to the judiciary. The lower courts have adopted a myriad of approaches to consideration of injunctions in the face of a NEPA violation. There is a need for consistency among the courts on this issue, which potentially affects so many individuals and businesses, like petitioner, whose activities are regulated by the federal government and subject to NEPA. Clarification of the scope and standards for remedial relief for a violation of NEPA is required to ameliorate the uncertainty and confusion which now exists. The petition for certiorari should be granted.

Respectfully submitted,

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September 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed February 23, 2001]

Nos. 99-36065
99-36094
D.C. No. CV-97-00456-JKS

NATIONAL PARKS & CONSERVATION ASSOCIATION,
Plaintiff-Appellant-Cross-Appellee,

v.

BRUCE BABBITT,
Secretary, United States Department of the Interior;
ROBERT STANTON, Director, National Park Service,
Defendants-Appellees,

and

HOLLAND AMERICA LINE-WESTOURS,
Defendant-Intervenor-Appellee-Cross-Appellant.

Appeal from the United States District Court for the District of Alaska James K. Singleton, District Judge, Presiding

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Argued and Submitted
July 31, 2000—Anchorage, Alaska

OPINION

Before: Dorothy W. Nelson, Stephen Reinhardt, and Sidney R. Thomas, *Circuit Judges*. Opinion by Judge Reinhardt

REINHARDT, *Circuit Judge*:

Glacier Bay National Park and Preserve is a place of "unrivaled scenic and geological values associated with natural landscapes" and "wildlife species of inestimable value

to the citizens." The Bay was proclaimed a national monument in 1925 and a national park in 1980. UNESCO designated Glacier Bay an international biosphere reserve in 1986 and a world heritage site in 1992.

Not surprisingly, many people wish to visit the park. As there are no roads to Glacier Bay, most tourists arrive by boat. To be more specific, most—approximately 80% of the parks visitors—arrive on large, thousand-passenger cruise ships. In 1996 the National Park Service (Parks Service) commenced implementation of a plan that increased the number of times cruise ships could enter Glacier Bay each summer season immediately by 30% and overall by 72% if certain conditions were met. In its environmental assessments, the Parks Service acknowledged that this plan would expose the parks wildlife to increased multiple vessel encounters, noise pollution, air pollution, and an increased risk of vessel collisions and oil spills. The Parks Service also acknowledged that it did not know how serious these dangers to the environment were, or whether other dangers existed at all. Nevertheless, declaring that its plan would have "no significant impact" on the environment, the Parks Service put it into effect with out preparing an environmental impact statement (EIS).

The plaintiff National Park and Conservation Association (NPCA), a nonprofit citizen organization, alleges that the Parks Services failure to prepare an EIS violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* It seeks an order requiring the Parks Service to prepare an EIS and enjoining implementation of the plan pending its completion. The district court ruled that an EIS was not required because the Parks Service had made its findings after adequately "canvassing the existing knowledge base." We reverse the district court's ruling and remand with instructions to enjoin the plan's increases in vessel traffic, including any portion already put into effect, until the Parks Service has completed an EIS.

FACTUAL AND PROCEDURAL HISTORY

There may be no place on Earth more spectacular than the Glacier Bay. Located in the Alaskan panhandle, surrounded by snow-capped mountain ranges, Glacier Bay extends sixty miles inland and encompasses ten deep fjords, four of which contain actively calving tidewater glaciers, and approximately 940 square miles of "pristine" marine waters. The air quality, though fragile, is still unspoiled and permits those fortunate enough to be visitors a crisp, clear view of the Bay with its glacier faces as well as the opportunity to breathe the fresh and invigorating air. The park is the habitat for an extraordinary array of wildlife. On the land, pioneer plant communities grow in areas recently exposed by receding glaciers. Moose, wolves, and black and brown bears roam the park's spruce and hemlock rain forest. Bald eagles, kittiwakes, murrelets, and other seabirds nest along the shore; sea otters, harbor seals, Steller sea lions, harbor and Dall's porpoises, minke, killer, and humpback whales reside in the bay.

The Steller sea lion and the humpback whale, two of the marine mammal species that inhabit Glacier Bay, are imperiled. The Steller sea lion was listed as a threatened species under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, in 1990. The worldwide population of the species declined by as much as 48% in the thirty years prior to 1992.[1] Glacier Bay has several "haul-out" sites where hundreds of Steller sea lions gather. The humpback whale, "the most gamesome and lighthearted of all the whales," Herman Melville, *Moby Dick*, 123 (Harrison Hayford & Hershel Parker, eds., W.W. Norton & Co. 1967) (1851), has been listed as an endangered species since the enactment of the ESA in 1973. Until a moratorium was instituted in 1965,

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[1] In 1997 the Steller sea lion was reclassified, for the worse, as an endangered species. *Greenpeace v. Natl Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1139 (W.D. Wash. 2000).

commercial whaling decimated the worldwide population of humpback whales. Today only 10,000 to 12,000 remain.[2] A subpopulation of humpbacks spends the summer feeding season in southeast Alaska, including the waters of Glacier Bay; other humpbacks remain there throughout the year.

Watercraft—cruise ships, tour boats, charter boats, and private boats—provide primary access to Glacier Bay's attractions. Approximately 80% of the park's visitors are cruise ship passengers. According to the Parks Service's environmental assessment, the "key attraction of the visit to Glacier Bay . . . [is] [t]he glaciers at the head of the West Arm [of the Bay.] [They] are larger, more active, and considered by the [cruise-ship] companies to offer a more spectacular experience."[3] The ships linger at the glaciers from between fifteen minutes to an hour and provide a large, high viewing platform from which to witness the crack and crash of the great ice masses as they cast off huge shards of floating ice. Although the ships' height permits an unobstructed view of the parks geologic features, it limits close views of the wildlife and vegetation that form such a significant feature of the park.

Between 1968 and 1978, vessel traffic in Glacier Bay increased dramatically. In 1978 the U.S. National Marine

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[2] In 1991 the U.S. National Marine Fisheries Service (Fisheries Service) established a Final Recovery Plan for the humpback. The plan sets a long-term goal of restoring 60% of the species's pre-whaling population (about 125,000) and a more immediate goal of maintaining and enhancing "current or historical habitats used by humpback whales by reducing disturbance from human-produced underwater noise in important habitats when humpback whales are present and [encouraging] government entities at all levels to correct existing impacts on habitats of humpback whales."

[3] To get there, cruise ships cross the entrance to the Bay and traverse its western bank, both areas particularly frequented by humpback whales. *See* Christine M. Gabriele, Population Characteristics of Humpback Whales in Glacier Bay and Adjacent Waters 9 (1994).

Fisheries Service (Fisheries Service) produced a "biological opinion" based on its studies of the humpback whale population in Glacier Bay. The biological opinion expressed concern over the "uncontrolled increase of vessel traffic" in the whales' departure from the Bay during 1978 and 1979, and cautioned that a continued increase in the amount of vessel traffic "would likely jeopardize the continued existence of the humpback whale population frequenting southeast Alaska." The Fisheries Service recommended that the Parks Service regulate the number of vessels entering Glacier Bay; restrict vessels from approaching and pursuing whales; and conduct studies on whale feeding behavior, the effect of vessels on whale behavior, and the acoustic environment.[4]

The Parks Service soon thereafter promulgated regulations governing the entry and activity of cruise ships and other vessels in Glacier Bay. The regulations provided that only two cruise ships could enter the bay each day, with a maximum of 89 cruise ship entries between June 1 and August 31. Smaller boats, designated "private/pleasure craft," were limited to twenty-one entries per day with a seasonal maximum of 538 entries. Vessels were prohibited from intentionally positioning themselves within a quarter of a nautical mile of a whale or attempting to pursue a whale. Within "designated whale waters," vessels had to operate at a constant speed of ten knots or less and follow a mid-channel course.

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[4] The acoustic environment appears to be very important to humpback whales. As many a schoolchild is aware, humpbacks produce a variety of sounds, including moans, grunts, screams, and long complex "songs." According to the Parks Service, "[p]ostulated functions for whale vocalizations include maintenance of distance among individuals, species and individual recognition, maintenance of social organization, localization of underwater topography, and contextual information about feeding, court-ship, or alarm."

In 1983 the Fisheries Service issued a second biological opinion, which concluded in part:

> [I]f the existing restrictions on the operation of vessels within the Bay were removed, the associated disturbance would be likely to jeopardize the continued existence of the Southeast Alaska humpback whale stock. . . . [A]ny increase in vessel traffic in Glacier Bay probably will add to the level of traffic encountered by humpback whales in southeast Alaska, and thereby add to cumulative impacts to the humpback whale.

Nevertheless, the Fisheries Service opinion stated that a slight in crease in vessel traffic was tolerable, provided that the number of individual whales entering the bay did not fall below the 1982 level and that appropriate corrective measures were taken. Accordingly, in 1984 the Parks Service promulgated a Vessel Management Plan (VMP) and regulations that pro-vided for a 20% increase, in increments, in the previously authorized vessel entry quotas. This overall increase—allowing for a total of 107 cruise ship entries per season—was fully realized in 1988.

In September 1992 the Parks Service completed an internal draft of a new VMP that proposed to increase the then current level of cruise ship entries in Glacier Bay by an additional 72%. On February 19, 1993, the Fisheries Service issued a third biological opinion expressing its concern "about the decline in humpback whale use of Glacier Bay," and stating that there were "no studies to show that this decline is not due to avoidance of vessel traffic." Although the Fisheries Service did not oppose the draft VMP, it urged the Parks Service "to take a conservative approach in all management actions that may affect humpback whales" and to implement particular research and monitoring programs.[5] The Fisheries Service

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[5] "Because there has not been systematic monitoring of humpback whale prey density, distribution and type, and noise produced by vessels,

did not find that the Parks Service's proposed action was "likely to jeopardize the continued existence and recovery "of Steller sea lions.

As mandated by NEPA, the Parks Service investigated whether a substantial cruise-ship increase would significantly affect the environment in Glacier Bay. *See* 42 U.S.C.§ 4332(2)(C); 40 C.F.R. § 1508.27. In May 1995 the Parks Service issued a combined proposed VMP and environmental assessment (EA). An EA is a document that, under NEPA, (1) provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact;" (2) aids an agency's compliance with NEPA when no EIS is necessary; and (3) facilitates preparation of an EIS when one is necessary. 40 C.F.R. § 1508.9(a). An EA is a "less formal and less rigorous" document than an EIS. *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1998).

The combined VMP/EA reported the existence of environmental questions that went far beyond the potential impact on the humpback whales. It also described and assessed six alternative approaches for managing vessels in Glacier Bay, ranging from Alternative Four's reduction in vessel traffic by between 14% and 22%, to Alternative One's maintenance of the status quo, to Alternative Five's increase of cruise ship entries by 72%. Notwithstanding the environmental problems

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it is impossible to ascribe whale distribution shifts to one cause or another. However, it is [the Fisheries Service's] opinion that for the next three seasons (1993, 1994, and 1995), the levels of vessel use combined with vessel operation requirements as described in the September 25, 1992, Vessel Management Plan and environmental assessment are not likely to jeopardize the continued existence of the North Pacific population of humpback whales." This opinion did not consider the localized effects of the pro-posed action on the portion of the North Pacific whale population that actually uses Glacier Bay, nor did it address possible effects that were significant but less than likely to jeopardize the population's continued existence.

it recognized, the Parks Service expressed its preference for Alternative Five. This alternative maintained the limit of two cruise ship entries per day, but increased the total number of seasonal entries from 107 to 184.[6] It did not increase seasonal entries for other vessels.

The Parks Service conducted six public hearings on the VMP. The Parks Service received approximately 450 comments, approximately 85% of which opposed Alternative Five and favored Alternative Four. The Sierra Club, the Alaska Wildlife Alliance, and the plaintiff NPCA spoke out against Alternative Five at the hearings, and submitted expert opinion and evidence in opposition to the Parks Services findings. On March 20, 1996, the Parks Service announced its decision to implement a modified version of Alternative Five as its new VMP. Under this modified plan, the seasonal entry quota for cruise ships would increase by 30% for 1996 and 1997, and by as much as 72% thereafter if certain conditions were met. Also, the entry quotas for charter boats and private/pleasure craft would increase by 8% and 15%, respectively. An accompanying revised EA, titled "Impacts of the Modified Alternative," discussed the effects of the new VMP on threatened and endangered marine mammals, other marine mammals, birds, and the human environment, including air quality.

The revised EA included the following observations:

- Steller sea lions using open water "would be subject to increased vessel traffic and its related disturbance. Little is known about the effects of the disturbance."

- The increased vessel traffic would expose the harbor seal, harbor porpoise, Dalls porpoise, humpback whale,

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[6] The EA identifies the "season" as lasting from June 1 through August 31. The proposed increase permits vessel entries every day of the season. Accordingly, under Alternative Five, there will be thirty-eight more days of vessel traffic each season.

killer whale, and minke whale to "increased levels of disturbance," causing the animals to expend energy reserves and possibly compromising "the survival and reproduction of individual animals." In addition, "the potential for daily and seasonal exposure of humpback whales to underwater noise would increase." "The effect of increased levels of disturbance" on these cetacean populations, it concluded, was "unknown."

- Marine mammals "using open-water habitats would be subject to increased vessel traffic and its related disturbance. However, little is known about the effects of the disturbance." The risk of vessels colliding with marine mammals would increase, although "the degree of increase is unknown." Similarly, there would be an increased risk of ship collisions, other accidents, and associated fuel spills. "The rate of actual spills could increase, but the degree of increase in unknown."

- "The degree to which disturbance and displacement would affect the humpback whale populations in Glacier Bay is unknown. Several mitigation measures implemented under this alternative would reduce the risk of whale/vessel interactions and the level of potential effects on individual whales. The implementation of oil-spill response plans by the cruise ship industry could reduce oil spill risks to individual whales."

- It was "unknown" whether populations of Marbled Murrelets and Kittlitz Murrelets would change under the VMP.

- "The overall effect on bald eagle populations is unknown."

- "It is unknown if waterfowl populations would change under this alternative."

Finally, the revised EA acknowledged that the increase in cruise ship entries would "result in more violations of state air quality standards," but stated that the "biological effects of these air pollutants from stack emissions are unknown."

At the same time it released its revised VMP and EA,[7] the Parks Service also released a proposed Finding of No Significant Impact (FONSI). As its title suggests, a FONSI states the reasons why an agency's proposed action will not have a significant effect on the environment and, therefore, it believes that the preparation of an EIS is unnecessary under NEPA. *See* 40 C.F.R. § 1508.13. The Parks Services Glacier Bay FONSI stated, in relevant part:

> The [Parks Service] has determined that the modified alternative [Five] . . . can be implemented with no significant adverse effect to natural and cultural resources as documented by the environmental assessment. Key environmental issues associated with the modified alternative include effects on marine mammals and birds from vessel disturbance and air quality degradation from cruise ship stack emissions. Some disturbance to these resources would be expected. However, the mitigation strategies included in this action would significantly reduce environmental effects resulting from vessel entries.

The NPCA submitted objections to the VMP/EA and the proposed FONSI on April 19, 1996. The Parks Service adopted the VMP/EA and issued its FONSI and final regulations on the plan on May 30. *See* 61 Fed. Reg. 27,008, *codified at* 16 C.F.R. 13.65(b).

On May 2, 1997, the NPCA filed suit against Secretary Babbitt and Dennis J. Galvin, Acting Director of the Parks

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[7] The revised VMP and EA will hereinafter be referred to simply as the VMP and EA.

Service. The NPCA requested declaratory and injunctive relief requiring the Parks Service "to rescind the new VMP and prohibiting any activities to be conducted pursuant to these rules until such time as [the Parks Service has] complied with NEPA by preparing an adequate EIS for use in evaluating the new VMP before reimplementing it." Holland America Line-Westours, Inc. ("Westours"), one of the two major cruise ship operators in Glacier Bay, intervened as a defendant pursuant to Federal Rule of Civil Procedure 24(a).

The NPCA, the Parks Service, and Westours each filed motions for summary judgment. On August 24, 1999, the district court issued an order denying NPCAs motion, granting the Parks Services motion, and denying Westours's motion as moot. The court observed that the EA made it "fairly clear that interactions between whales and vessels might be seriously disruptive to wildlife residing in the Park." It also acknowledged "that the effects cruise ship operations have on Glacier Bay National Park and the animals that live there are unknown, either before ship operations increased or since," and that the "Modified Alternative Description[EA] attached to the FONSI contains a long list of uncertainties about the potential effects of increased vessel traffic." While it proposed that further studies be conducted, it determined that the existence of the numerous uncertainties was not sufficient to require an EIS. "The EA in this case," the district court wrote, "thoroughly canvasses all existing information and recognizes that theoretical harms might occur, but concludes that there is no evidence suggesting that a significant risk exists that the harms will occur." It concluded:

> [A] modest increase in the number of visitors may be allowed while the studies are commissioned and the existing data base increased with care taken through ameliorization [sic] to recognize and eliminate problems as they arise.

The district court granted the Parks Service's cross-motion for summary judgment and dismissed the case. The NPCA appealed, and Westours cross-appealed.

ANALYSIS

I. THE PARKS SERVICE VIOLATED NEPAA.

A. Standard of Review

We review a district courts decision to grant or deny a motion for summary judgment de novo. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000) (citation omitted). In reviewing an agency's decision not to prepare an EIS under NEPA, we employ an arbitrary and capricious standard, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999), that requires us to determine whether the agency has taken a "hard look" at the consequences of its actions, "based [its decision] on a consideration of the relevant factors," *id.*, and provided a "convincing statement of reasons to explain why a project's impacts are insignificant." *Metcalf*, 214 F.3d at 1142.

B. Environmental Assessment

[1] NEPA requires that an Environmental Impact Statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.A. § 4332(2)(C). However, if, as here, an agency's regulations do not categorically require the preparation of an EIS, then the agency must first prepare an Environmental Assessment (EA) to determine whether the action will have a significant effect on the environment. *See* 40 C.F.R. § 1501.4; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). If the EA establishes that the agency's action "*may* have a significant effect upon the . . . environment, an EIS must be prepared." *Foundation for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1178 (9th Cir. 1982) (emphasis added); *see also Blue*

Mountains, 161 F.3d at 1212. If not, the agency must issue a Finding of No Significant Impact (FONSI), *see Blue Mountains*, 161 F.3d at 1212; 40 C.F.R. §§ 1501.4, 1508.9, accompanied by " 'a convincing statement of reasons' to explain why a projects impacts are insignificant." *Blue Mountains*, 161 F.3d at 1212 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

[2] Whether there may be a significant effect on the environment requires consideration of two broad factors: "context and intensity." *See* 40 C.F.R. § 1508.27; 42 U.S.C. § 4332(2)(C); *see also Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988).[8] Context simply

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[8] "Significantly" as used in NEPA requires considerations of both context and intensity:

> (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
>
> (b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:
>
> (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
>
> (2) The degree to which the proposed action affects public health or safety.
>
> (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

delimits the scope of the agency's action, including the interests affected. Intensity relates to the degree to which the agency action affects the locale and interests identified in the context part of the inquiry. Here, the context is Glacier Bay National Park, its natural setting, its variegated non-human inhabitants, and its pure but fragile air quality; intensity must be established in this case by using three of the standards enumerated in § 1508.27: (1) the unique characteristics of the geographic area; (2) the degree to which VMP Alternative Five's possible effects on the human environment are highly

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(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

uncertain; and (3) the degree of controversy surrounding those possible effects. The unique characteristics of Glacier Bay are undisputed and of overwhelming importance. Accordingly, we next consider the agency's determination in light of the degree of uncertainty manifested, and the degree of controversy generated. Either of these factors may be sufficient to require preparation of an EIS in appropriate circumstances. *Sierra Club*, 843 F.2d at 1193, 1194; *Blue Mountains*, 161 F.3d at 1212-14. In the end, we conclude that the Parks Service clearly erred and that the high degree of uncertainty and the substantial controversy regarding the effects on the quality of the environment each necessitates preparation of an EIS.

C. Uncertainty

[3] An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. *See Blue Mountains*, 161 F.3d at 1213 ("significant environmental impact" mandating preparation of an EIS where "effects are 'highly uncertain or involve unique or unknown risks' ").[9] Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, *see id.* at 1213-14 (lack of supporting data and cursory treatment of environmental effects in EA does not support refusal to produce EIS), or where the collection of such data may prevent "speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." *Sierra Club*, 843 F.2d at 1195.

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[9] *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993), is not to the contrary. There the court simply noted that the cases cited did "not stand for the proposition that the existence of uncertainty mandates the preparation of an impact statement." 14 F.3d at 1334 n.11. *Blue Mountains* has since filled that gap. 161 F.3d at 1213-14.

[4] Here, scientific evidence presented in the Parks Service's own studies revealed very definite environmental effects. The uncertainty was over the intensity of those effects. The FONSI reported increased daily and seasonal exposure of humpback whales and other denizens of the Bay to underwater noise (and predicted a range of adverse behavioral responses), "traffic effects" (including increased risk of collision, affecting whales, harbor seals, sea otters, murrelets, and molting waterfowl), and increased risk of oil pollution for all animal life in the Park. An increase in cruise ships would also "result in more violations of state air quality standards for cruise ship stack emissions." [10] Among the specific effects set forth in the VMP/EA upon which the FONSI was based were that increased vessel entry into the Bay would: subject stellar sea lions to additional disturbance; increase the escape patterns of various types of whales; potentially increase mortality rates and change the social patterns of the harbor seal; preclude sea otters from colonizing the upper Bay; and increase disturbance of feeding murrelets, other seabird nesting colonies, and bald eagles.

[5] The EA describes the intensity or practical consequences of these effects, individually and collectively, as "unknown." *See* pages 2425-2427, *supra*. The uncertainty manifested through the EA stems from two sources: an absence of information about the practical effect of increased traffic on the Bay and its inhabitants; and a failure to present adequate proposals to offset environmental damage through mitigation measures. The lack of data regarding the practical effect of increased traffic, like the failure to investigate

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[10] The initial EA reported that "[t]he airsheds of the steep-walled fjords of Glacier Bay are susceptible to visible stack emissions becoming trapped by temperature inversions and light winds. . . .[T]he tolerance for air pollution in Glacier Bay is extremely low." In a study conducted in 1986 and 1987, 25 of 77 cruise ships's emissions were over twice the permitted duration.

environmental impacts in *Blue Mountains*, 161 F.3d at 1213, undermines "[t]he [Parks Services] EA . . . [which] is where the [agency's] defense of its position must be found." *Id.* That document states that "[l]ittle is known about the effects of the [cruise ship] disturbance" on steller sea lions; "[t]he effect of increased levels of disturbance" on Glacier Bay's cetacean populations is "unknown"; and "the degree of increase [in oil spills as a result of increased traffic] is unknown." It also states that the effect of noise and air pollution on murrelets, bald eagles, and waterfowls remains "unknown" because unstudied. Moreover, the extent to which air pollution will diminish the beauty and quality of the natural environment is also unknown.[11] The Parks Services EA does, however, establish both that such information may be obtainable and that it would be of substantial assistance in the evaluation of the environmental impact of the planned vessel increase. The EA proposes a park research and monitoring program to "fill information needs, and understand the effects of vessel traffic on air quality, marine mammals [and] birds . . . to assist in the prediction, assessment, and management of potential effects on the human, marine, and coastal environments of Glacier Bay resulting from human use of the environment with particular emphasis on traffic." That is precisely the information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be prepared in this case.

The Parks Service proposes to increase the risk of harm to the environment and then perform its studies. It has in fact already implemented the first part of its VMP. This approach has the process exactly backwards. *See Sierra Club*, 843 F.2d

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[11] The initial EA acknowledged, however, that the proposed increase in vessel traffic "could significantly impair the visual and photographic scene at the glacier faces in Tarr Inlet, the high point of a Glacier Bay cruise, and elsewhere in the park."

at 1195. Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges. A part of the preparation process here could well be to conduct the studies that the Park Service recognizes are needed. That might be done here by performing the studies of the current vessel traffic and extrapolating or projecting the effects of the proposed increase.[12] Ultimately, the Park Service may develop other means for obtaining the information it currently lacks. The point is, however, that the "hard look" must be taken before, not after, the environmentally-threatening actions are put into effect.

[6] The Parks Service's lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service to do the necessary work to obtain it. In *Blue Mountains*, we found that general statements about possible environmental effects failed the "hard look" test required under NEPA. 161 F.3d at 1213. Here, the Parks Services repeated generic statement that the effects are unknown does not constitute the requisite "hard look" mandated by the statute if preparation of an EIS is to be avoided. *See id.* ("'general statements about

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[12] With respect to the cruise ships, the addition of thirty-eight extra days of cruising may simply require the service to determine the current effects of vessel traffic, and extrapolate or project from that data the effects of increased traffic, taking into account all available relevant information, including technological change affecting the cruise ship-industry. It appears that the impact of the other increases in vessel traffic may also be determined by studying the effects of the current traffic rates. We do not decide here, however, how the EIS should be conducted. That is for the Park Service to determine initially in the context of the applicable statutes and regulations. We intend only to observe that in this case, unlike some others, an actual study can probably be conducted on the basis of existing conditions and that it is not necessary to consider the intensity of the effect of vessel traffic entirely in the abstract. There are practical consequences resulting from the current level of traffic that may be studied and considered in the final report.

"possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided'") (citing *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)). The Park Service's statement of reasons does not provide a convincing explanation as to why the requisite information could not be obtained prior to placing the VMP into effect. *Id.* In short, the information currently provided by the Parks Service in its EA leaves us with the firm impression that, absent successful mitigation measures, there is a substantial possibility that the VMP will significantly affect Glacier Bay Park, including the air, the water, and the various species that inhabit the Park.

[7] The second source of uncertainty is the Parks Service's ability to offset the environmental impact of the increase in vessel traffic through its proposed mitigation measures. An agency's decision to forego issuing an EIS may be justified in some circumstances by the adoption of such measures. *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000); *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993). "If significant measures are taken to 'mitigate the projects effects, they need not completely compensate for adverse environmental impacts.'" *Wetlands Action Network*, 222 F.3d at 1121 (quoting *Friends of Payette*, 988 F.2d at 993). While the agency is not required to develop a complete mitigation plan detailing the "precise nature of the mitigation measures," the proposed mitigation measures must be "developed to a reasonable degree." *Id.*[13] A "'perfunctory description,'" *Okanogan Highlands Alliance v. Williams*, 236

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[13] In *Laguna Greenbelt, Inc. v. United States Dept of Transp.*, 42 F.3d 517, 528 n.11 (9th Cir. 1994), the court held that "scientific uncertainties in the mitigation measures" need not be discussed during the EIS discussion period. Such uncertainties must be discussed, however, during the EIS preparation period. 40 C.F.R. § 1502.22.

F.3d 468, 473 (9th Cir. 2000) (quoting *Neighbors of Cuddy Mountain*, 137 F.3d at 1380), or "'mere listing' of mitigation measures, without supporting analytical data," is insufficient to support a finding of no significant impact. *Id.* (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998)). In evaluating the sufficiency of mitigation measures, we consider whether they constitute an adequate buffer against the negative impacts that may result from the authorized activity. Specifically, we examine whether the mitigation measures will render such impacts so minor as to not warrant an EIS. *See Greenpeace Action*, 14 F.3d at 1332.

[8] There is a paucity of analytic data to support the Parks Service's conclusion that the mitigation measures would be adequate in light of the potential environmental harms. By contrast, in *Okanogan* the Forest Service conducted computer modeling to predict the quality and quantity of environmental effects, discussed the monitoring measures to be put in place, ranked the probable efficacy of the different measures, detailed steps to achieve compliance should the measures fail, and identified the environmental standards by which mitigation success could be measured. *Id.* at 473-75. Because the Forest Service "considered extensively the potential effects and mitigation processes," the court found that discussion of the mitigation measures was adequate to constitute the convincing statement of reasons to permit preparation of a FONSI. *Id.* at 477 (emphasis omitted). In this case, however, the Parks Service did not conduct a study of the anticipated effects of the mitigation measures nor did it provide criteria for an ongoing examination of them or for taking any needed corrective action (except for the plan to conduct "studies"). As with the rest of its proposal, it planned to act first and study later.

The Parks Service first described its proposed mitigation measures in the initial EA. That document reflects the uncertainty that exists as to whether the mitigation measures

would work: moreover, it is unclear from that document whether the measures are sufficiently related to the effects they are designed to cure. The Parks Service simply noted, for example, that mitigation measures "*could* mitigate some potential effects to humpbacks in concentrated whale-use areas"; "*could* reduce whale/vessel collisions and reduce the noise emanating from the ships"; "[s]pecial-use-area closures and restrictions implemented under . . . alternative[five] *may* off-set some of the expected disturbance." Air pollution measures "would *be expected* to contribute to a reduction in cruise ship stack emissions *over time*." Further, the service stated that it:

> intends to institute a comprehensive research and monitoring program to fill informational needs and quantity the effects of vessel traffic on air quality, marine mammals, birds and visitor-use enjoyment. The monitoring program, developed within one year of the record of decision, will stipulate research and protection actions [Parks Service] will undertake to ensure that environmental effects do not exceed acceptable levels . . .

The final EA was similarly uncertain with respect to the proposed measures effects. It recognized that a 10-knot speed restriction to offset the increased vessel traffic might disturb the creatures in the park, but that "very little is known about the effects of the disturbance." The EA also stated that the increase in seasonal entries "*could* reduce whale/vessel collisions and reduce the noise level emanating from the ships. . . , [f]ollow-up research and monitoring will be essential to define humpback whale use patterns in Glacier Bay resulting from this alternative"; and that "requiring cruise ships to implement oil-spill response plans *could* mitigate the effects of oil spills." As for air pollution, "the magnitude of increased violations would presumably be reduced over time." There is no indication, however, as to how long any such reduction might take or how great a reduction might

ultimately be accomplished. In short, there is no evidence that the mitigation measures would significantly combat the mostly "unknown" or inadequately known effects of the increase in vessel traffic. The EA's speculative and conclusory statements are insufficient to demonstrate that the mitigation measures would render the environmental impact so minor as to not warrant an EIS. *See Greenpeace Action*, 14 F.3d at 1332.

It is instructive to contrast this case with *Wetlands Action Network*. In that case, the court made clear that, though the mitigation measures were underdeveloped, the imposition of special conditions, enforced through a permit, and reviewed by various other agencies ensured that the measures would been forced in a manner that properly reduced negative environmental impact. *See Wetlands Action Network*, 222 F.3d at 1121. Here, there were no such special conditions applied to the Parks Service or the tour boat operators in connection with the measures designed to mitigate the effects of the proposed increase in cruise ships. In fact, whether the mitigation measures are fully enforced or not, the EA reflects significant uncertainty as to whether they could provide an adequate buffer against the harmful effects of the plan. This is understandable in light of the fact that the extent of those harmful effects is itself unknown, and that in such circumstance it is particularly difficult to estimate the effects of mitigation measures. That fact, however, does not help make the measures adequate for purposes of avoiding the preparation of an EIS—quite the contrary.

As with the question of the extent of the unremediated injury that might otherwise occur, the question of the impact of the proposed mitigation measures must be studied as part of the preparation of an EIS rather than after the injury has transpired. The fact that the agency plans to test the effect of its mitigation measures does not relieve it of the obligation to prepare an EIS prior to the time of the threatened environ-

mental damage. Rather, the Parks Service's testing proposal shows that the information necessary to determine the impact of any mitigation measures, like the information relating to the extent of the injurious effects, may well be obtainable before any environmental injury occurs. The proposed mitigation studies thus argue in favor of preparing an EIS, not against it.

The district court found that the agency's decision not to prepare an EIS was justified because the uncertainty reflected the existing state of knowledge. The passage of cruise ships through Glacier Bay is not a new development, however. Both the vessels' sailings and the dispute over the potential environmental damage have existed for a substantial period of time. No new scientific developments are required in order to obtain the requisite information. The Parks Service itself proposes to conduct studies which it anticipates may provide the answers. We simply hold that, under these circumstances, where significant environmental damage may occur to a treasured natural resource, the studies must be conducted first, not afterwards.

D. Controversy

The district court also found that NPCA had not made a sufficient showing of controversy to require preparation of an EIS. Again, we disagree.

[9] Agencies must prepare environmental impact statements whenever a federal action is "controversial," that is, when "substantial questions are raised as to whether a project. . . may cause significant degradation of some human environmental factor," *Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1539 (9th Cir. 1997) (quoting *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988)) (Reinhardt, J., concurring in part and dissenting in part), or there is "a substantial dispute [about] the size, nature, or effect of the major Federal action." *Blue Mountains*, 161

F.3d at 1212 (citing *Greenpeace Action*, 14 F.3d at 1335; *Sierra Club*, 843 F.2d at 1190). A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, *see Greenpeace Action*, 14 F.3d at 1334 (holding that party may not establish controversy *post hoc*, when at the time of the agency's action no controversy existed), casts serious doubt upon the reasonableness of an agency's conclusions.[14] *See Idaho Sporting Congress*, 137 F.3d at 1150; *Blue Mountains*, 161 F.3d at 1212. NEPA then places the burden on the agency to come forward with a "well-reasoned explanation" demonstrating why those responses disputing the EAs conclusions "do not suffice to create a public controversy based on potential environmental consequences." *LaFlamme*, 852 F.2d at 401 (citing *Jones v. Gordon*, 792 F.2d 821, 829 (1986)).[15] The term "well reasoned explanation" is simply a less direct way of saying that the explanation must be "convincing." *See Metcalf*, 214 F.3d at 1142.

[10] After publication of the initial EA, and before publication of the EA and FONSI, the Parks Service received

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[14] Although a court should not take sides in a battle of the experts, *Greenpeace Action*, 14 F.3d at 1333; *see also Wetlands Action Network*, 222 F.3d at 1120-21, it must decide whether the agency considered conflicting expert testimony in preparing its FONSI, and whether the agency's methodology indicates that it took a hard look at the proposed action by reasonably and fully informing itself of the appropriate facts. *See Idaho Sporting Congress*, 137 F.3d at 1150 (precluding the agency from relying on expert opinion in the absence of hard data).

[15] Consensus among the parties over the proposed measures is ordinarily sufficient to satisfy the agency's burden. *See Greenpeace Action*, 14 F.3d 1334 (holding that consensus among objecting parties before agency declined to prepare EIS sufficient to rebut showing of controversy); *Bonneville Power*, 117 F.3d at 1536 (holding that where agency cooperated with objecting parties, and alleviated most of those parties concerns, agency need not prepare EIS). No such consensus existed here.

450 comments on the VMP, approximately 85% of which opposed Alternative Five and favored Alternative Four. This volume of negative comment is more than sufficient to meet the "out-pouring of public protest" discussed in *Greenpeace Action.*[16] *See* 14 F.3d at 1334. More important, to the extent the comments urged that the EAs analysis was incomplete, and the mitigation uncertain, they cast substantial doubt on the adequacy of the Parks Service's methodology and data. The dispute between NPCA and the Parks Service thus goes beyond a disagreement of qualified experts over the "reasoned conclusions" as to what the data reveal. *See Greenpeace Action*, 14 F.3d at 1335.[17] Here, the agency's conclusions were not reached by reasoned extrapolation from the data, rather the data were simply insufficient. The Parks Service acknowledged that an increase in vessel traffic would have an environmental impact. The data, however, did not establish the intensity of that impact, nor the efficacy of the mitigation measures designed to offset that unquantified impact. NPCA asserted that the effects on the environment would likely be substantial. The Parks Service responded that the extent of the effects was unknown. Therein lay the controversy. In its response, the agency proposed to determine the extent of the effects by implementing the VMP and studying its consequences. As we have stated in Section I.C, the absence of currently available information does not excuse the Parks Service from preparing an EIS when there is a reasonable possibility that such information can be obtained

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[16] That case distinguished other showings of public controversy made incases such as *Wild Sheep*, 681 F.2d at 1175 and n.10, by requiring that any "outpouring of public protest" be *contemporaneous* with the period for commentating on the EA, and holding that a *post hoc* dispute was insufficient to establish the necessary type of controversy. *Greenpeace Action*, 14 F.3d at 1334. That is not the case here.

[17] Where there is conflict in the data, or the evidence supports several conflicting opinions, the agency may rely upon the opinion of its expert. *Wetlands Action Network*, 222 F.3d at 1121.

in connection with the preparatory process. The agency's response is therefore not sufficient to resolve the controversy. Accordingly, the case before us is controlled by *Blue Mountains, Idaho Sporting Congress*, and *Sierra Club*; and *Greenpeace Action* is not to the contrary. Here, preparation of an EIS is mandated by the "controversy," as well as by the "uncertainty," factor of the intensity provision. 40 C.F.R. § 1508.27(b).

II. INJUNCTIVE RELIEF

[11] NPCA asks this court to "reverse the District Court and remand the case with instructions to enjoin further implementation of the 1996 Vessel Management Plan until a full Environmental Impact Statement is prepared." To determine whether injunctive relief is appropriate, "even in the context of environmental litigation," we apply "the traditional balance of harms analysis." *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (citations omitted); *see also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541, 542 (1987) (holding that unless Congress directed otherwise, "a court must balance the competing claims of injury" in determining whether injunctive relief is appropriate). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable," *Amoco Prod. Co.*, 480 U.S. at 545. When the "proposed project may significantly degrade some human environmental factor," injunctive relief is appropriate. *Alaska Wilderness Recreation & Tourism Assoc. v. Morrison*, 67 F.3d 723, 732. *See also Sierra Club*, 843 F.2d at 1195; *Save the Yaak*, 840 F.2d at 722.

[12] NPCA has made the requisite showing for injunctive relief. As we concluded in Section I, an EIS is required. We so held because of the significant adverse impact on the environment that might result from the implementation of the VMP. *See Blue Mountains*, 161 F.3d at 1216 (an EIS is

required of an agency in order that it explore, more thoroughly than an EA, the environmental consequences of a proposed action whenever "substantial questions are raised as to whether a project may cause significant [environmental] degradation"). Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement.[18] Here, the Parks Service has already undertaken a 30% increase in cruise-ship traffic preliminary to a seventy-two percent increase. The potential effects of its action extend beyond the endangered marine mammal population to the rest of the wildlife at Glacier Bay, as well as the Park's air quality. Kittiwakes, murrelet, eagles, sea otters, seals, sea lions, porpoises, and killer and minke whales, as well as the better known humpbacks, are affected. Until an EIS is prepared and the effects of increased vessel traffic on the inhabitants and air quality of Glacier Bay are properly examined, there is a sufficient possibility of environmental harm that the VMP may not be implemented.

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[18] We have recognized, nevertheless, that in "unusual circumstances" an injunction may be withheld, or, more likely, limited in scope. *See Forest Conservation Council*, 66 F.3d at 1496. *Amoco Production Co.* is not to the contrary. There, the Supreme Court rejected a presumption of irreparable injury where an agency failed adequately to investigate the consequences of its proposed action, *see Amoco Prod. Co.*, 480 U.S. at 544-45: it required courts to undertake the traditional "balance of harms" analysis. *Id.* at 545. We have fully weighed the competing interests using our traditional equitable jurisdiction, and conclude that injunctive relief is appropriate. Finally, in *Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989), then-Circuit Judge Breyer held that, because NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures. *See id.* at 500 (because NEPA can do no more than require the agency to produce and consider a proper EIS, the harm that NEPA intends to prevent is imposed when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires). *Marsh* also justifies injunctive relief in this case.

Westours argues that the damage to its business should be considered when addressing injunctive relief, that its financial losses outweigh the potential damage to the environment, and that NPCA "is not entitled to an injunction against the 32 seasonal cruise ship entries" that the Parks Service authorized for the 2000-2004 seasons. As a general rule, only the federal government may be a defendant in a NEPA action. *Wetlands Action Network*, 222 F.3d at 1114. An exception may be made in the remedial phase of a case where the contractual rights of the applicant are affected by the proposed remedy. *See Forest Conservation Council*, 66 F.3d at 1495. Here, Westours was permitted to intervene, and appears before us as a party-defendant. Westours has asserted financial damages premised upon its contracts of carriage. Its loss of anticipated revenues, however, does not outweigh the potential irreparable damage to the environment. Moreover, neither Westours nor those of its passengers who may be unable to view Glacier Bay at the time they originally planned have cause to claim surprise as a result of any injunction. The plaintiffs filed their objections to the plan approximately five years ago and just one year later sought an injunction. If the passengers who booked cruises on any "excess" tours were not warned by Westours of the pending litigation, their interests were not well served by that company. Thus, while Westours has standing to object to our grant of injunctive relief, its evidence fails to tilt the balance of harms in its favor.

For the purposes of injunctive relief, we may admit evidence not before the district court to show that an agency has rectified a NEPA violation after the onset of legal proceedings. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). Here, Westours asks us to consider evidence addressing one aspect of NPCA's complaint, the humpback whale population. We will assume that such evidence is admissible. Westours evidence shows a short term increase in the humpback whale population, but

completely fails to address the other environmental effects at issue here. Nor does it address the deficiencies in the Parks Services EA and FONSI. Accordingly, Westours's evidence is insufficient to dissuade us from granting injunctive relief.

Finally, we note that where the question of injunctive relief "raise[s] intensely factual issues," the scope of the injunction should be determined in the first instance by the district court. *See Alaska Wilderness*, 67 F.3d at 732. Here, however, there are no such intensely factual issues and the scope of the injunction to which NPCA is entitled is quite plain. It is appropriate, therefore, for us to decide the injunction question on this appeal.

We direct the district court to enjoin the further increases in vessel traffic, and to return traffic levels to their pre-1996 levels. We agree, however, with the Parks Service's contention that "the current vessel regulations are in important respects more environmentally protective than the 1984 regulations they replaced." The NPCA does not contend (and the record would not support a finding) that the 1996 VMP's establishment of protected "whale waters" in parts of Glacier Bay or implementation of oil-spill response plans pose an actual or potential threat to the environment. Accordingly, there is no basis for enjoining that part of Alternative Five. Our order is limited to the thirty to seventy-two percent increase in the seasonal entry quota for cruise ships, and the eight percent increase for charter boats and fifteen percent increase for "private/pleasure" craft. All entry quotas shall be returned to the levels preceding the introduction of Alternative Five. The other measures adopted by the Parks Service in its VMP shall remain in effect, and will not be subject to the injunction.

Notwithstanding the above, we recognize that the issuance of the mandate in this case may be delayed for some period of time as a result of the en banc procedures that this court follows, and that such delay may occur even if we ultimately

decide not to grant a rehearing en banc. We do not believe, however, that a sufficient emergency exists to warrant our ordering that the injunction become effective prior to the completion of our customary process. Accordingly, we cannot know in advance how close to the opening of this year's cruising season the mandate will issue, or even whether issuance will be delayed until after the season has already begun. Nor can we determine how great may be the practical disruption that would occur were last minute cancellation of a significant number of voyages required. Accordingly, we leave it to the district court to decide upon the effective date of the injunction it is ordered to issue, and, specifically, to decide in its informed discretion, and on the basis of any evidence that may be presented, whether the injunction should take effect prior to the completion of this year's cruising season, sometime this September.

CONCLUSION

Much of the briefing and argument in this appeal has focused on the impact of the VMP on the imperiled humpback whale population. However, a variety of other non-human inhabitants of the Park—bald eagles, kittiwakes, murrelets, sea otters, harbor seals, Steller sea lions, harbor and Dall's porpoises, minke, and killer whales—are, as the EA reflects, affected, and the already fragile air quality is as well. The existence of adverse effects is not uncertain. What is uncertain is the extent of the likely environmental injury, and the impact of the proposed mitigation measures. The Parks Service's own experts, whose integrity the government commended at oral argument, admitted both the likelihood of certain harms to the environment of Glacier Bay and their uncertainty about the likelihood of other harms. In giving insufficient respect to their experts' evaluation of harm, declaring that no significant environmental effects were likely, and implementing the vessel traffic increase without

complying with the requirements of NEPA, the Parks Service's decision-makers made a "clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

Glacier Bay Park is too precious an ecosystem for the Parks Service to ignore significant risks to its diverse inhabitants and its fragile atmosphere. We reverse the decision below and remand with instructions that the district court issue an injunction enjoining the granting of permits to vessels pursuant to the 1996 increase in vessel entry quotas pending the Parks Services completion of an EIS. Permits shall be limited in number to those authorized prior to the issuance of the EA, the VMP, and the FONSI. The district court shall provide in its order for whatever specific actions it deems necessary to ensure that the number of cruise ships and other vessels authorized to enter Glacier Bay (pending completion of an EIS) shall not exceed the number authorized prior to the 1996 increase. It shall have the discretion, however, to determine the effective date of its injunction, including whether the order shall be made effective prior to the completion of this years cruising season.

REVERSED AND REMANDED WITH INSTRUCTIONS

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jun. 13, 2001]

No. 99-36065
CT/AG#: CV-97-00456-JKS

NATIONAL PARKS & CONSERVATION ASSOCIATION,
Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary, United States Department of the Interior; ROBERT STANTON, Director, National Park Service; HOLLAND AMERICAN LINE-WESTOURS, INC.,
Defendants-Appellees.

JUDGMENT

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED AND REMANDED with instructions.

Filed and entered: 02/23/01

A97-0456-CV (JKS)
Judge Singleton
B. Landon (AUSA)
C. Christianson
S. Reisch

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

Jun 6, 2001

by /s/ Illegible

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed May 18, 2001]

No. 99-36065
D.C. No. CV-97-00456-JKS

NATIONAL PARKS & CONSERVATION ASSOCIATION,
Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary, United States Department of the Interior; ROBERT STANTON, Director, National Park Service,
Defendants-Appellees,

and

HOLLAND AMERICA LINE-WESTOURS, INC.,
Defendant-Intervenor/Appellee.

ORDER

Before: NELSON, D.W., REINHARDT, and THOMAS, Circuit Judges:

The panel has voted to deny the petitions for rehearing. Judges Reinhardt and Thomas have voted to deny the petitions for rehearing en banc and Judge Nelson so recommends.

The full court has been advised of the petitions for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and petitions for rehearing en banc are denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed Aug. 24, 1999]

Case No. A97-0456 CV (JKS)

NATIONAL PARKS & CONSERVATION ASSOCIATION,
Plaintiff,

vs.

BRUCE BABBITT, *et al.*,
Defendants,

and

HOLLAND-AMERICA LINE-WESTOURS,
Intervener-Defendant.

ORDER

I. INTRODUCTION

The National Parks and Conservation Association ("NPCA"), a nonprofit organization that is interested in the National Park System, filed suit under the National Environmental Policy Act of 1969 [1] ("NEPA") and the Administrative Procedure Act ("APA"),[2] challenging the National Park Service's ("NPS" or "Park Service") decision not to prepare an environmental impact statement "EIS") when developing its Vessel Management Plan ("VMP") for cruise and other ship operations in Glacier Bay National Park

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[1] 42 U.S.C. §§ 4321-4347 (1994). All statutory citations will be to the 1994 edition of the United States Code.

[2] 5 U.S.C. §§ 701-706.

and Preserve ("Glacier Bay National Park" or "the Park"). NPCA specifically challenges conclusions reached in the NPS's Environmental Assessment ("EA") that lead the Park Service to issue a Finding of No Significant Impact ("FONSI") rather than prepare an EIS. Holland-America Line-Westours ("Westours"), which operates cruise ships that enter Glacier Bay National Park, intervened in the suit to oppose the injunction NPCA sought and to protect its interest in receiving future permits to enter the Park. NPCA has now moved for summary judgment and the NPS and Westours each filed cross-motions for summary judgment. All motions were opposed. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, the NPS also filed a motion to strike an exhibit to NPCA's motion for summary judgment, which the NPCA also opposed. After extensive briefing, all motions are now ripe.[3]

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual background

Glacier Bay National Park was established in 1925. Located approximately sixty miles northwest of Juneau, Alaska, the Park as currently constituted covers approximately 3.28 million acres of shore, wilderness area and saltwater bay. The Park contains the largest protected marine ecosystem in the National Park system, is an international biosphere reserve, and was designated a "World Heritage Site" by the United Nations in 1992. The Congress has designated much of the park wilderness area. Humpback

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[3] *See* Dockets No. 45 (NPCA's motion for summary judgment); 49 (NPS's cross-motion for summary judgment, opposition to NPCA's motion and motion to strike); 53 (Westours' cross-motion for summary judgment); 54 (NPCA's opposition and reply to NPS's motion); 55 (NPCA's opposition and reply to Westour's motion); 56 (NPCA's opposition to NPS's motion to strike); 57 (NPS's reply to NPCA's opposition to summary judgment motion and motion to strike), 59 (Westours' reply to NPCA's opposition).

whales, Steller sea lions and many other creatures live within the Park's boundaries. The remoteness of the Park from population centers and its status as wilderness assume that if the public is to enjoy it and benefit from it, it must access the Park by ship or other vessel.

The Park Service has long used vessel quotas to regulate the number of cruise ships, tour boats, charters and private boats that enter Glacier Bay National Park. The vessel management regulations that proceeded the VMP were promulgated in 1984 and provided for a twenty-percent increase in vessel quotas, which was achieved in 1988. The Park Service imposed other restrictions on vessel traffic as well, such as maximum speed requirements and restrictions on parts of the Park that vessels could enter.

The Park Service began preparing the current Glacier Bay VMP and EA in 1991. In May, 1995, the Park Service published a VMP and EA containing six alternative revisions of the then current plan. *See* Docket No. 45, Exh. 1.[4] The Park Service identified Alternative Five as its preferred plan. Under Alternative Five, seasonal entry quotas for cruise ships would increase by seventy-two percent, with two cruise ships, three tour boats, six charter boats and twenty-five private boats allowed to enter Glacier Bay National Park per day between June 1 and August 31 each year. The other plans ranged from suggesting no change to the Park Service's actions, to a plan that decreased the number of vessels permitted to enter the Park.

In the EA, the Park Service discussed potential environmental consequences of each proposed alternative. For the EA's Alternative Five, the Park Service noted that the effects of increased cruise ship traffic were in many ways uncertain. Despite the fact that whales have been extensively studied, no

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[4] DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, GLACIER BAY NATIONAL PARK AND PRESERVE, VESSEL MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT (May 1995).

direct evidence exists that any whale has even been indirectly harmed by proximity to vessel. True, whales have been harmed directly in collisions with vessels, but collisions are extremely rare and it appears could be avoided through reasonable precautions. Nevertheless, men and women knowledgeable about whales and other marine life can certainly speculate about ways in which indirect contact between whales and other sea life on the one hand and ships and vessels on the other hand could possibly harm sea life. Existing research cannot conclusively rule out all of the possible harms about which concerned scientists allied with Plaintiffs have speculated. The EA described these potential effects of cruise ship operations in conditional language. For example, the EA concluded that whale responses to vessel noise "could include decreased respiratory intervals, increased dive times, and moving away from the sound source, which could cause whales to be displaced from important feeding areas." *See id.* at 4.5-1. The EA additionally noted that avoidance behavior associated with noise disturbances "causes an expenditure of energy reserves and decreases feeding time, possibly compromising the survival and reproduction of individual animals." *See id.* "Although short-term displacement of whales may occur, abandonment of preferred habitats as a result of vessel traffic is not anticipated." *Id.* In summary, the EA noted that

> [p]redictions about humpback whale use of Glacier Bay and the contribution of this group of whales to total humpback whale numbers in Southeast Alaska are highly speculative due to the degree of uncertainty associated with factors such as prey availably. Given the increase of vessel quotas and operation under this alternative, there is no way to determine the effect of whale use of the park.

Id. at 4.5-4. The EA's analysis of Alternative Five's impact on humpback whale concluded that the "degree to which disturbance and displacement would affect the humpback

whale populations in Glacier Bay is unknown." *Id.* Thus, the issue presented to the National Park Service is whether these uncertainties require preparation of an EIS.

The EA's assessment of Alternative Five's potential impact on Glacier Bay's Steller sea lion population used similarly conditional language. According to the document, sea lions "would probably not be exposed to increased disturbances" at their haul-out sites, but also that "[l]ittle is known about the effects" of disturbances related to open water encounters between sea lions and cruise ships. *See id.* The EA additionally implied that the effects of increased cruise ship operation in the Park was unclear: "[d]isturbed sea lions could expend energy or be moved from feeding areas when fleeing and/or be injured." The EA's analysis of Alternative Five's impact on Steller sea lions concluded that the alternative "is unlikely to jeopardize the continued existence and recovery of the Steller sea lion." *Id. at* 4.5-5.

The EA's assessment of Alternative Five's impact on other marine creatures in Glacier Bay was similarly conditional. For example, the EA noted that increased cruise ship activity "could affect nonendangered cetaceans," *see id.*, and "little is known about the effects of" disturbances caused by cruise ships on harbor seal in open water, *see id.* at 4.5-6.

The National Marine Fisheries Service prepared a biological opinion under section 7 of the Endangered Species Act "concerning the effects of the National Park Service's proposed vessel management plan for Glacier Bay National Park and Preserve on threatened and endangered species." *See* AR 4, 15 at 1.[5] The report focused on the threatened

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[5] The voluminous Administrative Record in this case contains ten exhibits set forth in approximately twenty-five volumes. Each volume of the Administrative Record contains numbered subparts. Citation to "AR 4, 15 at 1" is therefore a citation to Exhibit 4, numbered subpart 15, page one. Certain exhibits are set forth in multiple volumes, so a citation to "AR 10, 1-11 at 15" refers to Exhibit 10, volume 1, document 11, page 15.

Steller sea lion and the endangered gray and humpback whales. After concluding that the proposed alternative "will not likely jeopardize the continued existence and recovery" of the Steller sea lion and "will not likely jeopardize the continued existence" of the gray whale, the biological opinion addressed the potential impact of the proposed alternative on the humpback whale. *See id.*, Attach. at 12-13. The biological opinion noted the effect of the dearth of information on the EA's conclusion:

> The NPS [VMP] and [EA] document a declining trend in whale usage of Park waters and a decline in crude birth rate since 1988. However, given the small sample sizes involved, and the high inherent variability of these type of data, it is hard to assess whether or not these trends are real. If the trends are real, there is no way to determine whether they are due to changes in prey distribution or increases in vessel traffic because there have not been conclusive prey studies or vessel interaction studies. However, because these changes have occurred coincidentally with increases in vessel traffic, NMFS cannot rule out the hypothesis that some humpback whales may avoid the area due to vessel traffic.

See id. at 13. The opinion concluded

> Because there has not been systematic monitoring of humpback whale prey density, distribution and type, and noise produced by vessels, it is impossible to ascribe whale distribution shifts to one cause or another. However, it is NMFs' opinion that . . . the level of vessel use combined with vessel operation requirements as described in the [VMP and EA] are not likely to jeopardize the continued existence of the North pacific population of humpback whales.

See id. at 13-14. The opinion additionally noted the NMFS's concern "about the decline in humpback whale use of Glacier

Bay. There are no studies to show that this decline is not due to avoidance of vessel traffic. . . ." *See id.* at 14. After noting that the Endangered Species Act requires the Park Service to use its authority to conserve endangered species, NMFS urged the Park Service "to take a conservative approach in all management actions that may affect humpback whales. . . ." *Id.* The opinion recommended that the Park Service implement a humpback whale feeding ecology research program, conduct a study of how vessel presence in the Park alters whale behavior, and continue monitoring programs to identify and analyze whale use of the Park. *Id.*

On March 20, 1996, after the time for public comment had expired, the Park Service published a FONSI and selected a revised version of Alternative Five for the VMP. Under the adopted VMP, the summer seasonal cruise ship quota was increased by thirty percent over the 1995 level for 1996 and 1997, and could increase by up to seventy-two percent. Specific areas of the Park would be closed to motorized vessels and additional measures, such as oil-spill mitigation measures and underwater noise reduction strategies, was also included in the plan. The seasonal quotas for charter boats and private vessels were increased by eight and fifteen percent respectively. A research plan was also contemplated.

After discussing the substance of the VMP and briefly describing the alternative plans, the FONSI provided that

> The NPS has determined that the modified alternative . . . can be implemented with no significant adverse effect to the natural and cultural resources as documented by the environmental assessment. Key environmental issues associated with the modified alternative include effects of marine mammals and birds from vessel disturbances and air quality degradation from cruise ship stack emissions. Some disturbances to resources would be expected. However, the mitigation strategies included in this action would significantly

> reduce environmental effects resulting from vessel entries. In addition, the NPS intends to institute a comprehensive research and monitoring program to fill information needs and quantify the effects of vessel traffic on air quality, marine mammals, birds and visitor-use enjoyment. The monitoring program, developed within one year of the record of decision, will stipulate research and protection actions NPS will undertake to ensure that environmental effects do not exceed acceptable levels. An annual report, detailing efforts, funding levels and personnel allocated to VMP actions will be made available to the public. This program will enhance the scientific basis for future adjustments in vessel quotas.

See Docket No. 45, Exh. 2 at 2-3. In specifically addressing the effect of the VMP on humpback whale populations, the FONSI provided

> In 1993 the National Marine Fisheries Service ("NMFS") issued a nonjeopardy opinion for the humpback whale. The NMFS recommended that the NPS implement a humpback whale feeding ecology research program that would provide information on movement, distribution, and abundance of humpback whales in Glacier Bay and northern southeastern Alaska. The Park Research and Monitoring Program incorporates this recommendation. Based on the implementation of the recommendations by the NMFS, previous consultation under the Endangered Species Act, and subsequent consultations with NMFS, no further action is require at this time by the National Park Service under the Endangered Species Act in implementing the modified alternative.

Id. at 2-3. The Park Service's Alaska Field Director certified that the modified alternative "does not constitute a major federal action significantly affecting the quality of the human

environment" and concluded that NEPA did not require preparation of an EIS. *See id.* at 3.

B. Procedural background

NPCA filed suit pursuant to section 10 of the APA challenging the Park Service's decision not to prepare an EIS analyzing the effects of the proposed VMP on Glacier Bay National Park. The complaint seeks a declaration that the VMP violates NEPA and the APA and is "therefore null and void and of no legal force and effect" and an injunction prohibiting the Park Service from giving effect to the VMP until the Park Service completes an EIS. The Court allowed Westours to intervene. *See* Docket No. 32. The parties have filed cross-motions for summary judgment.

III. SUMMARY JUDGMENT STANDARD AND STANDARD OF RENEW

A. Summary judgment standard

Summary judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure is appropriate if the Court finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *See* FED. R. CIV. P. 56(c). The Court will construe all evidence and draw all evidentiary inferences in favor of the non-moving party. *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2727, 458-59 & nn. 4, 5 (3d ed. 1998) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)). A dispute over a material fact exists if the evidence would allow a reasonable fact-finder to return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no genuine issue of material fact." *Id.* at 247-48. The non-moving party may defeat the summary judgment motion by producing sufficient specific facts to establish that there is a genuine issue of material fact for trial, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), but mere allegations of factual dispute, without more, will not defeat an otherwise-proper motion. *See Provenz v. Miller*, 102 F.3d 1478, 1489-90 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997).

Use of the summary judgment procedures set out in Rule 56 of the Federal Rules of Civil Procedure has been approved in this circuit as a means of bringing disputes under NEPA before the Court. *See, e.g., City of Angoon v. Hodel*, 803 F.2d 1016, 1019-1022 (9th Cir. 1986); *County of San Diego v. Babbitt*, 847 F. Supp. 768, 772 (S.D. Cal. 1994), *aff'd*, 61 F.3d 909 (9th Cir 1995). This Court will proceed on that basis. It notes, however, that summary judgment is a procedure for testing the legal sufficiency of claims and defenses to determine whether a trial on the merits before a court or jury is warranted. It seems inappropriate for the performance of an essentially reviewing function, since under no circumstances will a trial be held and evidence received and evaluated. It seems more appropriate to consider actions like this as administrative appeals in which the Court commissions briefing, evaluates the record in light of the briefs and, if desirable, oral argument, and reaches a decision which will then be reviewed de novo by the appellate court. On appeal the court might reach many decisions either affirming or overruling the agency decisions not to prepare an EIS, but it will not conclude that there are disputed issues of material fact requiring trial by court or jury. Reference to summary judgment standards add nothing of significance and may even be misleading if the Court confuses judicial review with typical actions for damages of equal relief.

B. Standard of review

Before it reaches the question of whether the Park Service violated NEPA by preparing a FONSI rather than an EIS the Court must establish the standard by which it will review the agency's decisions. NPCA argues that resolution of the relevant issues requires none of the technical expertise which warrants deference to the agency decision because its challenge is based in the legal grounds by which the NPS determined that the VMP would have "no significant impact" on Glacier Bay National Park. *See* Docket No. 45 at 12. Under NPCA's argument, because the Court will apply a legal standard to settled facts, the Court should analyze the agency's determinations under "reasonableness" standard, which is arguably less deferential to the agency's decision-making than is the arbitrary and capricious standard advocated for by the Park Service. *See id.* The Park Service responds that its determination was made in light of conflicting and uncertain scientific data particularly within its sphere of expertise, and argues that the Court's review should be at its most deferent. *See* Docket No. 49 at 11 (citing *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983)).

It is entirely possible that the parties' arguments about whether the agency should be judged by a "reasonableness" or "arbitrary and capricious" standard are about distinctions without differences. Courts, including panels of the Ninth Circuit, have suggested that differences between the reasonableness and arbitrary and capricious standards are merely semantic. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377-378 n.23 (1989) (''the difference between the 'arbitrary and capricious' and 'reasonableness' standards in not of great pragmatic consequence"). However, some panels of the Ninth Circuit have distinguished the standards. *See, e.g., Alaska Wilderness Recreation & Tourism Assoc. v. Morrison*, 67 F.3d 723, 727 (9th Cir.

1995); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 n.10 (9th Cir. 1992).

Courts reviewing agency decisions under NEPA apply two standards depending on the nature of the dispute under consideration whether it involves a question of fact, a mixed question of law and fact, or a pure question of law. *See Price Rd. Neighborhood Assoc. v. United States Dep't Transp.*, 113 F.3d 1505, 1508 (9th Cir. 1997). Factual disputes, which implicate agency expertise, are reviewed under the arbitrary and capricious standard and legal disputes are reviewed under the reasonableness standard. *See id.* Under the arbitrary and capricious standard, the Court must take a "hard look" at the environmental consequences of the agency's action to determine whether the agency's decision was "founded on a reasoned evaluation 'of the relevant factors.'" *See Marsh*, 490 U.S., at 378 (quoting *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1993). "[T]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *See Marsh*, 490 U.S. at 378 (quoting *Overton Park*, 401 U.S. at 416) (internal quotation marks omitted). Under the reasonableness standard, used to review mixed question and questions of law, "a court should not substitute its judgment for that of an agency if the agency's decision was fully-informed and well considered." *See Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1192 (9th Cir. 1988) (internal quotation marks and alterations omitted). *See also Alaska Wilderness Recreation & Tourism Assoc.*, 67 F.3d at 731 (setting aside Forest Service decision not to prepare supplemental EIS as "not reasonable").

The Court's starting point for determining the appropriate standard of review is the Supreme Court's decision in *Marsh*

and the Ninth Circuit's subsequent analysis of the case. *See* 490 U.S. at 377; *Greenpeace Action*, 14 F.3d at 1330-1331. In *Marsh*, an environmental organization argued, *inter alia*, that the Army Corps of Engineers ("Corps") violated NEPA by not supplementing an EIS because information developed after completion of the EIS undermined its conclusions, and that the Corps' expert review of the new information was incomplete. *See id* at 376. The Supreme Count ruled that information developed after an agency completed an EIS does not necessarily require the agency to prepare a supplemental EIS, noting that the dispute did not turn on interpretation of statutory terms or on application of the statute to settled facts, but rather on the facts of the case. *See id.* According to the Court, an agency's decision whether or not to supplement an EIS "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *See id.* at 376. "[A]nalysis of the relevant documents requires a high level of technical expertise [so] we must defer to the informed discretion of the responsible federal agencies." *Id.* (quoting *Kleppe v. Sierra Club*, 427 [U.S. 390, 412 (1976) (internal quotation marks omitted)). The Court ruled that the "reasonableness" standard previously applied by the Ninth Circuit and other federal courts of appeals was inapplicable and held that "so long as the [agency's] decision not to supplement the [EIS] was not 'arbitrary and capricious,' it should not be set aside." *See id.* (triple negative in original).

Since the Supreme Court issued *Marsh*, the Ninth Circuit has clarified the standard under which courts should review administrative agencies' interpretation of their duties under NEPA. The *Greenpeace Action* court heard an environmental organization's challenge to the adequacy of an EA prepared by the United States Fish and Wildlife Service and the agency's conclusion that it need not prepare an EIS. The court concluded that the *Marsh* Court's reasoning compelled it to adopt the arbitrary and capricious standard to analyze the fact-based inquiry. *See* 14 F.3d at 1330-1331. *See also. e. g.*,

Northwest Envt'l Defense Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997) (courts analyze whether agency's decision not to prepare an EIS was arbitrary and capricious by looking only to whether the agency engaged in a reasoned evaluation of the relevant factors).

To the extent the Court will decide the issues as a matter of law—but only to that extent—review of whether NEPA compels an agency to conduct an EIS whenever scientific uncertainty exists will be under the rule of reason. *See, e.g., Alaska Wilderness Recreation & Tourism Assoc.*, 67 F.3d at 727. However, where the Court must analyze the Park Service's decisionmaking process, or consider the sufficiency of the material reviewed by the agency, or in any other way review the factual bases of the Park Service's decision not to prepare an EIS, the Court "must defer to the informed discretion of the responsible federal agenc[y]." *See Marsh*, 490 U.S. at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)) (internal quotation marks omitted). Review that implicates the Park Service's expertise will be under the arbitrary and capricious standard. *See id.*

V. DISCUSSION

A. NEPA

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." *See* 42 U.S.C. § 4332(2)(C) (1994). *See also Northwest Envt'l. Defense Ctr. v. Bonneville Power Admin.*, 117 F. 3d 1520, 1535-36 (9th Cir. 1997). Rather than providing for a particular result, NEPA prescribes the necessary process federal agencies must follow when implementing major actions. *See Methow Valley Citizens Council*, 490 U.S. at 350. *See also Vermont Yankee*, 435 U.S. at 558. The statute's goals are to ensure the agency will have detailed information regarding significant environmental impacts where it makes its decision and to guarantee that this

information will be available to the interested public. *See Methow Valley Citizens Council*, 490 U.S. at 349; *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996). "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct it." *Marsh*, 490 U.S. at 371.

A threshold question here is whether the VMP will "significantly affect" the environment. *See Blue Mountain Biodiverisity Project*, 161 F.3d 1208, 1212 (9th Cir. 1998), *cert. denied sub nom, Malheur Lumber Co. v. Blue Mountain Biodiversity project*, 199 S. Ct. 2337 (1999). Federal regulations promulgated by the Council on Environmental Quality ("CEQ") [6] permit an agency planning a major federal action to prepare an EA [7] in order to determine whether it must prepare an EIS. *See* 40 C.F.R. §§1501.4 & 1508.9(a)(1). If the EA shows that the proposed action will have no significant impact, "the agency may issue a [FONSI] [8] and then execute the action." *See Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995); *California Trout v. Schaefer*, 58 F.3d 469, 472 (9th Cir. 1995). The federal agency must prepare an EIS before proceeding with the proposed activity if the EA shows that the proposed activity will have a significant impact. *See* 42 U.S.C. § 4332(2)(C); *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988) ("Section

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[6] NEPA regulations promulgated the CEQ are entitled to "substantial deference." *See Blue Mountain Biodiversity Project*, 161 F.3d at 1212 (citing *Marsh*, 490 U.S. at 372).

[7] An EA is a concise public document that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or [issue] a [FONSI]." *See* 40 C.F.R. 15089(a)(1).

[8] A FONSI is a document issued in conjunction with an EA that "briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared." *See id.* § 1508.13.

102(2)(C) of NEPA requires Federal agencies to file an EIS before undertaking 'major Federal actions significantly affecting the quality of the human environment.'"), *cert. denied sub nom, Sun Exploration & Prod. Co. v. Lujan*, 489 U.S. 1012 (1989). *See also Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985) ("A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process."). The Ninth Circuit has suggested that an agency that decides not to prepare an EIS must supply a "convincing statement of reasons" to explain why the project does not significantly affect the environment." *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). The present dispute revolves around an agency's obligation where environmental risks have been thoroughly studied and no significant evidence of harm have been uncovered but nevertheless concerned scientists can raise hypothetical questions which cannot conclusively be resolved. In this limited sense the existing record contains uncertainties. Whether these uncertainties require the preparation of an EIS is the controlling question presented. The NPCA attacks the Park Service's decision not prepare an EIS on both legal and factual grounds. After considering the parties' arguments and the extensive administrative record, the Court concludes that the Park Service did not abuse its discretion in concluding that harm to marine life traceable to increased cruise ship operations in Glacier Bay National Park was insufficiently likely to require preparation of an EIS.

B. Uncertainty in the review process

The parties agree that despite extensive study of marine mammals, the effects of the VMP on Glacier Bay National Park, and particularly on populations of humpback whales, Steller sea lions and other creatures that live within the Park, cannot be conclusively established. NPCA argues that the existence of uncertainties demonstrates the need for an EIS and that the Park Service, by relying on the fact that evidence

of uncertain harm was inconclusive, has failed to meet its burden of proving a convincing statement of reasons why the VMP will not significantly impact the environment. The Park Service argues that the party challenging an agency's action bears the burden on demonstrating that agency action will or may cause "significant degradation of the environment." *See* Docket No. 49 (citing *LaFlamme v. FERC*, 852 F.2d 389, 397 (9th Cir. 1988)). According to the Park Service, NPCA's legal argument must fail because an inconclusive record is insufficient to trigger NEPA's EIS requirement. Where there was submitted evidence of potential environmental harm but the evidence did not establish the certainty of harm, this uncertainty standing alone might require the preparation of an EIS to attempt to qualify the relative risk attending to the various alteratives before the agency. Here, however, it does not appear that the Park Service failed to satisfy its burden under NEPA as a matter of law.

NEPA requires an agency to prepare an EIS for any project "significantly affecting the environment." *See* 42 U.S.C. § 4332(2)(C). CEQ regulations define "affecting" in language which suggests that uncertainty about a proposal's environmental effects can require the agency to prepare an EIS. *See* 40 C.F.R. § 1508.3 (emphasis added) ("Affecting means will *or may* have an effect on."). Incorporating the CEQ's definition of "affecting" into § 4332(2)(C), an agency must prepare an EIS for any project that will or may have a significant environmental effect. *See* 42 U.S.C. § 4332(2)(C) & C.F.R. § 1508.3. Additionally, CEQ regulation speaks in the absolute only when discussing when an EIS is not required: the only federal programs for which EISs must not be performed are those which "will not have a significant effect on the human environment." *See* 40 C.F.R. § 1508.13. The Park Service's internal interpretation of its duty under NEPA additionally suggests that uncertainty can be resolved

in favor of preparation of an EIS. NPS-12[9] provides that an EIS must be prepared "whenever [a] park proposes or approves an action which may significantly impact the human enviroment." *See* Docket No. 45, Exh. 3 ¶ 4-1 (1997) (emphasis added). Other NPS-12 guidelines similarly suggest that NEPA's plain language requires an EIS when certain types of uncertainty exist. Under the heading "Criteria for Significant Impact," NPS-12 provides that where a "park proposal *might* have significant impact on the human environment, [the Park Service] *must* prepare an EIS." *See id.* ¶ 4.2 (emphasis added).

The Park Service argues that agencies need not prepare an EIS for all major action the of effects of which are uncertain where there is insufficient evidence to support an inference that the agency's contemplated action might adversely affect the environment. A handful of Ninth Circuit decisions have analyzed what effect different kinds of uncertainty regarding proposed action should have on an agency's decision not to prepare an EIS. In some cases, the courts concluded that impermissible uncertainty existed, generally where the agencies had not adequately considered a project's potential impacts, while in others, research into a project's potential effect could not answer the outstanding questions but the EA was found sufficient. *Compare Greenpeace Action*, 14 F.3d at 1332-1333, *with Idaho Sporting Congress*, 137 F.3d at 1151 *and Foundation for N. Am. Wild Sheep*, 681 F.2d at 1177-78. The distinction between the cases appears to center on what sort of uncertainty exists.

The Ninth Circuit has interpreted NEPA to compel preparation of an EIS where a plaintiff raises "substantial questions" about whether a project will have a potentially-

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[9] Hereinafter "NPS-12." NPS-12 sets forth guidelines produced by the National Park Service that interpret the United States Department of the Interior's NEPA regulations. *See* NPS-12 ¶ 1.1(B). "The guidance in NPS-12 is binding on all NPS personnel." *Id.*

significant effect on the environment, rather than requiring a plaintiff to show that the effect will in act occur. *E.g., Idaho Sporting Congress v. Thomas*, 137 F.3d 1146,1149-1150 (9th Cir. 1998). In *Foundation for North American Wild Sheep*, the court ruled that an EA prepared to determine whether a proposed road expansion would adversely affect a heard of protected bighorn sheep "failed to address certain crucial factors. . . ." *See* 681 F.2d at 1178. In failing to analyze the potential impact of the proposed activity the court concluded that the agency failed to take the requisite "hard look" at the agency action. *See id.* More recently, the *Idaho Sporting Congress* court concluded that an EA which relied on insufficient data and inapplicable standards left substantial questions about the potential effects of the proposed action. *See* 137 F.3d at 1151. The court noted that the agency's insufficient findings failed to provide the public with a basis for evaluating the agency's action. *See id.* at 1150. The *Idaho Sporting Congress* court additionally suggested that uncertainty compels preparation of an EIS, holding that "an EIS *must* be prepared if substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor." *Id.* (emphasis and ellipses in original).

In contrast, in *Greenpeace Action*, an environmental organization challenged a fishery plan issued by the United States Fish and Wildlife Service on the grounds that plan was likely to jeopardize the Steller sea lion, a species designated "threatened" under the ESA. One aspect of Greenpeace's suit was an allegation that the agency violated NEPA by declining to prepare an EIS for the specific rule challenged. Central to Greenpeace's argument was that uncertainty as to the rule's effect required preparation of an EIS. The Court rejected the contention that the uncertainty at issue indicated a failure to comply with NEPA, noting that uncertainties raised by Greenpeace indicated only a conflict of experts best resolved by deference to the agency's experts rather than a failure of

the agency to consider necessary criteria. *See id.* 1333. While some experts argued that a crash in Steller sea lion populations resulted from pollack depletion, others took a less definitive position that "it is *possible* that a reduction in the availability in pollock . . . is a *contributing factor*" in the decline in Steller sea lion populations. *See id.* at 1327. According to the *Greenpeace Action* court,

> An agency's careful evaluation of the impact of the proposed action, its collection and review of the evidence, and its reasoned conclusions as to what the [data] reveals would be for naught if by simply filing suit and supplying an affidavit by a hired expert, predicated upon the same facts relied upon by the agency but reaching a different conclusion, a litigant could create a controversy necessitating an EIS.

See 14 F.3d at 1335. The court concluded that Greenpeace had not raised a substantial question regarding the impact of the proposed activity, because the uncertainly indicated only a[sic] a dispute among opinions between which the court was not qualified to select, rather than a failure of the agency to consider the relevant factors. *See id.* at 1337. While the *Greenpeace Action* court acknowledged the existence of "uncertainty as to how pollack fishing affects the sea lion," the court concluded that the agency's decision was based on "substantial—though not dispositive—scientific data, and not on mere speculation." *See* 14 F.3d at 1333. In concluding that the agency adequately mitigated any potential harm, the *Greenpeace Action* court concluded that the agency's decisions "were based on a review of adequate scientific data." *See id.* Central to the decision in *Greenpeace Action* was the court's conclusion that mere speculation about potential harm, even where supported by admissible but debatable expert opinions, was insufficient to raise a "substantial question." This kind of uncertainty in the administrative record does not require a court to resolve disagreements among scientists regarding methodology or

compel agencies to address the dispute more fully in an EIS. *See id.* at 1333. Based on the sort of uncertainty in the record here, this case is closer to *Greenpeace Action* then *Wild Sheep* or *Idaho Sporting Congress*.

In the NEPA context, it appears that at least two types of uncertainty exist, the identification of which is determinative of the present legal dispute. As discussed in the *Wild Sheep* decision, for example, an agency can be uncertain about the effects of its actions because it has not considered the necessary factors. *See* 681 F.2d at 1178 ("The EA at issue here failed to address certain crucial factors, consideration of which was essential to a truly informed decision whether or not to prepare an EIS."). The agency has then failed to follow the requisite process to determine whether the federal action significantly affects the human environment. Uncertainty that exists because an agency has failed or refused to consider evidence in the record, or explain possible impacts, or otherwise refused to consider the effects of the proposed action cannot justify an agency's conclusion that the project would not significantly effect the human environment. *See id.* at 1179 (noting insufficiency of EA where questions about the project's effects were "ignored or, at best, shunted aside with mere conclusory statements"). In contrast, where an environmental effect is uncertain because the full record reflects a genuine lack of scientific consensus on the subject, an agency fulfils its procedural obligations under NEPA where the agency's conclusions are "clearly based on substantial—though not dispositive—scientific data, and not on mete speculation." *See Greenpeace Action*, 14 F.3d at 1333.

As the Supreme Court indicated in a slightly different context, NEPA does not require an agency to resolve scientific uncertainty before it selects an option, but rather only requires an agency to consider and disclose the uncertainties related to the proposed action. *See Baltimore Gas*

& Elec., 462 U.S. at 100 ("an agency must allow all significant environmental risks to be factored into the decision whether to undertake a proposed action"). When selecting among alternative options, an agency need not elevate environmental concerns above other appropriate considerations. *See Stryckers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980). According to the *Baltimore Gas & Electric* Court, a reviewing court's only duty under NEPA is to determine whether the agency "considered the relevant factors and articulated a rational connection between the fact found and the choice made." *Id.* at 105. Especially when an agency is making scientific determinations within its area of expertise rather than making simple findings of fact, the Court's duty is merely to guarantee that the agency has not ignored or shunted aside its duties. *See id.* at 103.

NPCA argues that the Park Service failed to research adequately what effects increased cruise ship operation would have on Glacier Bay National Park while the Park Service contends that it selected one of the appropriate alternatives. The record supports the Park Service. NPCA points to the conditional language employed in both the EA/VMP and the FONSI to argue that the Park Service failed to analyze the effects of caused by cruise ships on humpback whales and other marine creatures. NPCA argues essentially that the Park Service cannot know whether the VMP would significantly affect the environment because it has failed to collect sufficient information. If NPCA was correct and the Park Service had failed to consider information set forth in the administrative record, or had refused to answer open questions about the effects of increased cruise ship operation in Glacier Bay National Park, then clearly the Park Service would have violated NEPA. After reviewing the EA and FONSI in light of the entire administrative record, however, it appears that the Park Service's decision was based on a reasonable interpretation of the record.

C. The Administrative Record

The parties do not dispute that the effects cruise ship operation have on Glacier Bay National Park and the animals that live there are unknown, either before ship operations increased or since. No study has even attempted to reach definitive or absolute conclusions about what impact cruise ships have on the environment of Glacier Bay National Park, and the parties do not appear to dispute that such a study could not answer many questions even if completed. While a number of studies indicate that vessel traffic, or the consequences of vessel traffic, cause avoidance reactions in humpback whales or other Park inhabitants, no study directly states that an increase in vessel traffic would harm humpback whales or any other creature in Glacier Bay National Park. Rather, as the EA indicates, the evidence is inconclusive. The literature set forth in the administrative record suggests, however, that the Park Service based its decision on adequate evidence after considered the relevant evidence in the record.

The parties do not dispute that uncertainty exists in the record. The Modified Alternative Description attached to the FONSI contains a long list of uncertainties about the potential effects of increased vessel traffic in Glacier Bay National Park. The report notes, among other potential effects, that "[n]oise generated by vessels *could* cause behavioral responses from humpback whales. . . . [a]nd [r]esponses to vessel noise *could* include decreased respiratory intervals, increased dive times, and moving away from the sound sources, which could *cause* whales to leave or avoid important feeding areas." *See* Docket No. 45, Exh. 2, Attach 1 at 7 (emphasis added). The report also notes that the degree of collisions between humpback whales and vessels "is unknown." *Id.* at 9-10. According to the report, "[p]redictions about humpback whale use of Glacier Bay and the contribution of this group of whales to total humpback whale numbers in Southeast Alaska are highly speculative due to the degree of uncertainty associated with factors such

as prey availability. . . . [T]he NPS cannot determine the effect on overall whale use of the park." *Id.* at 10-11. The Park Service further concluded that it could not conclusively determine the long-term effects of increased vessel use on sea lions, non-endangered cetaceans, harbor seals using open-water habitat, and. the populations of murrelets, bald eagles and waterfowl. *See generally id.* at ' -17. The report also concluded that the biological effec.. ..used by increased air pollution resulting from stack emissions from increased vessel traffic was unknown. *See id.* at 17.

The EA makes it fairly clear that interactions between whales and vessels might be seriously disruptive to wildlife residing in the Park. According to the EA, "[o]n a daily basis, whales in concentrated-use areas could be exposed to nearly continuous loud engine noise from multiple vessels operating throughout daylight hours. . . ." See Docket No. 45, Exh. A at 4.5-1. When evaluating the potential effects of increased noise on humpback whales, the EA notes that noise

> could cause behavioral responses from humpback whales if the whales intersect each vessel's zone of influence. . . . Response to vessel noise could include decreased respiratory intervals, increased dive times, and moving away from sound the source, which could cause whales to be displaced from important feeding areas. Avoidance behavior associated with disturbance causes an expenditure of energy reserves and, decreases feeding time, possibly compromising the survival and reproduction of individual animals.

Id. The EA also notes that increased vessel density will necessarily result in more whale-vessel encounters. The EA characterizes whales' response to contact with vessels as "resulting in sudden departures and/or dramatic areal displays." *See* Docket No. 45, Exh. A at 4.5-3. The report indicated the potential for an increase in whale collisions with vessels. *See id.* According to the EA's summary,

"[d]isturbances and temporary displacement of humpback whales throughout feeding areas would be expected to increase as a result of increased cruise ship quotas. Humpback whales would continue to display disturbance behavior such as decreased respiratory intervals, increased dive times, and avoidance when approached by vessels." *See id.* at 4.5-4.

The Park Service concluded that increasing cruise ship operation did not pose a threat to the Glacier Bay National Park environment. While acknowledging that an increase in cruise ship traffic could impact humpback whales and other animals that make their homes in the Park, the EA concluded that it was unlikely that whales would abandon preferred habitat as a result of an increased cruise ship presence. *See id.* at 4.5-1. "The degree to which disturbances and displacement would affect the humpback whale population in Glacier Bay is unknown." *Id.* at 4.54.

The EA correctly indicated that cruise ship operation might have an adverse effect on humpback whales. One study noted that displacement of whales from preferred feeding sites, or the interruption of feeding, "may be the most serious result of human disturbance." *See* AR 10, 1-11 at 40.[10] The report further noted that disturbances were serious because whales only feed during a short time every year: "[humpback whales] only have a few months of the each summer and fall in which to gather enough food for a year. Although these animals must be able to tolerate occasional or intermittent interruption of their feeding, chronic disturbance will undoubtedly have a cumulative and deleterious effect in their fitness." *See id.* The report did not include any conclusion that cruise ships cause chronic disturbances.

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[10] C. SCOTT BAKER & LOUIS M. HERMAN, NATIONAL PARK SERVICE, BEHAVIORAL RESPONSES OF SUMMERING HUMPBACK WHALES TO VESSEL TRAFFIC: EXPERINIRNTAL AND OPPORTUNISTIC OBSERVATIONS (1989).

It also appears that interaction between humpback whales and cruise ships or other vessels might compel whales to expend additional energy, as the EA indicated. Studies set forth in the administrative record suggest that whales engage in aerial behavior such as breaching or slapping the water with their flippers of flukes as a "startle response" to vessel traffic. *See id.* at 40. The same report noted that both locomotion and repeated areal behavior require the expenditure of energy. *See id.* Another study indicated that the presence of large vessels resulted in significant increases [sic] in significant increases in dive times. *See* AR 10,1-12 at 15.[11] Whales in the presence of slower-moving vessels choose what the study called a "vertical avoidance strategy," which also included increased dive times. *Id.* at 16. The report also noted that whale groups tended to disperse when the proximity of vessels. A different study that analyzed the effect of dive times on whales noted that humpback whales generally make shallow dives of 4-6 minutes in duration, but discussed humpback whale dives that lasted as long as 21 minutes. *See* AR 10, 3-55 at 358, 360.[12] The study further noted that oxygen utilization and energy expenditures increased with the depth of dives. *See id.* at 361. Another study concluded that "it is plausible that an increase in vessel traffic is detrimental to whales or other cetaceans, but little quantitative evidence is available to substantiate the claim." *See* AR 10.1-13 at 7.[13]

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[11] C. SCOTT BAKER, ET AL., THE IMPACT OF VESSEL TRAFFIC ON THE BEHAVIOR OF HUMPBACK WHALES IN SOUTHEAST ALASKA: 1982 SEASON (1983).

[12] William Ford Dolphin, *Dive Behavior and Estimated Energy Expenditures of Foraging Humpback Whales In Southeast Alaska*, 65 CAN. J. ZOOLOGY 354 (1986).

[13] C. SCOTT BAKER, *ET AL.*, THE IMPACT OF VESSEL TRAFFIC ON THE BEHAVIOR OF HUMPBACK WHALES IN SOUTHEAST ALASKA (1982).

Another report, which discussed the interaction between killer whales and boats, noted that orcas respond to disturbances caused by vessels by swimming faster than undisturbed whales. *See* AR 10, 8-105 at 154.[14] According to the report,

> The approach of boats clearly affected the movement pattern of the killer whales in Johnstone Strait. Short-term effect by approaching boats was fairly high and consistent during this study. Killer whales responded to approaching boats by increasing their swimming velocities and by tending to swim toward open water. Increased swimming speed is a common cetacean response to boat disturbance. . . . Humpback whales in Alaskan waters swim faster when boats draw near. . . .

Id. at 157. The report further noted that long term effects of human activities may include a reduction of the whale population's biological fitness, and might include "disruption of energy budgets and 'critical behaviors' such as reproduction, feeding and rest." *See id.* at 158. The report discussing orcas did not directly link the conclusions it drew regarding killer whales to expected responses in humpback whales. The report suggested, however, that whales in general have similar responses to human interaction, and that the same conclusions which could be drawn from killer whale responses could apply to humpback whales. Also, orcas appear to occasionally use the waters of Glacier Bay National Park. None of the report's conclusions regarding whale interaction where phrased in definite language.

One of the federal government's own experts indicated that it did not possess sufficient information to answer determineatively certain important questions. As NMFS noted when

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[14] Susan Kruse, *The Interaction Between Killer Whales and Boats in Johnson Strait, B. C.*, in DOLPHIN SOCIETIES 149,154 (Karen Pryon & Kenneth S. Norris, eds., 1991).

providing a biological opinion regarding the consequences of the proposed alternative on humpback whale populations,

> given the small sample sizes involved, and the high inherent variability of these type of data, it is hard to assess whether or not these trends are real. If the trends are real, there is no way to determine whether they are due to changes in prey distribution or increases in vessel traffic because there have not been conclusive prey studies of vessel interaction studies.

See A.R. 4 at 16, Attach. 1 at 11. The NMFS opinion further noted the lack of, rather than conflict in data, providing that because there was no "systematic monitoring of humpback whale prey density, distribution and type, and noise produced by vessels, it is impossible to ascribe whale distribution shifts to one cause or another." *See id.* Similar to the *Greenpeace Action* case, where the parties submitted conflicting expert opinions, it appears that the opinions discussed in the EA sufficiently discuss the extensive record and disclose the kind of disagreements between experts that Congress has determined the agency rather than the courts should resolve.

As an initial matter, the Court rejects NPCA's attack on the Park Service's reliance on the NMFS assessment. *See* Docket No. 45 at 22-27. NPCA contends that the Park Service's reliance on the opinion was arbitrary and capricious because the NMFS assessment considered only whether increased cruise ship operation would threaten the continued existence of humpback and gray whales and Steller sea lions rather whether cruise ships posed some less serious threat. NPCA also contends that the NMFS biological opinion errs by considering all North Pacific whales rather than whale populations localized in Glacier Bay. The record reflects, however, that the Park Service considered far more documents that only the NMFS study. The Park Service considered a large and detailed record that included documents that reached conclusions both similar to and

contrasting with the NMFS study. Assuming that the NMFS study was insufficient for the reasons complained of by NPCA, other documents considered by the Park Service adequately filled any alleged gaps.[15] The Park Service committed no error in looking to the study as part of its review of the effect caused by increased cruise ship operation.

The purpose of an EA is to provide sufficient information by which the agency and public can determine whether or not an EIS is necessary or sufficient. *See generally* 40 C.F.R. § 1508.9(a). An agency could easily sidestep the potentially-burdensome and time consuming NEPA requirements were it allowed to justify its refusal to prepare an EIS on resolvable uncertainties in the record. If NEPA allowed an agency to conclude that it would not prepare an EIS because it refused to determine the potential effects of proposed action, and imposed no duty to consider the potential effects, agencies could prevent decisionmakers and the public from seeing the full and fair analyses of proposed agency action. NEPA's goals would be thwarted. However, to state that every time an agency is faced with uncertainties in the record it must either resolve the uncertainty through preparation of an EIS also would interfere with the statute's requirements. "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct it." *Marsh v. Oregon Natural Resources Council*, 490 U.S, 360, 371 (1989). NEPA's requirements are satisfied so long as the agency has considered the relevant evidence in the record and set forth acceptable bases for its decision. The statute dos not mandate that an agency research unresolved

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[15] *See, e.g.*, AR 10, 4-61 (CHRISTINE M. GABRIELE, POPULATION CHARACTERISTICS OF HUMPBACK WHALES IN GLACIER BAY AND ADJACENT WATERS (1994)) (discussing generally localized humpback whale populations); AR 10, 12-179 (JANICE M. STRATLEY, POPULATION CHARACTERISTICS OF HUMPBACK WHALES (MAGAPTERA NOVAEANGLIA) IN GLACIER BAY AND ADJACENT WATERS (1989)) (same).

ambiguities when there exist legitimate bases in the record for the decision reached.

D. Application of the CEQ factors

NPCA argues that an EIS is required even if the Park Service did not violated NEPA as a matter of law because the proposed action "significantly affects the environment." [16] CEQ regulations require that an agency must consider the intensity of the impact when determining whether the project may have a significant environmental impact by considering the project's context and intensity. *See* 40 C.F.R. § 1508.27(b). The term "intensity" "refers to the severity of impact," which should be evaluated according to ten enumerated factors. *See id.* § 1508.27(b)(1)-(10). The Court will set aside the Park Service's decision only if the agency committed a "clear error in judgment." *See Marsh*, 490 U. S. at 378. NPCA alleges that the Park Service failed adequately to consider a number of the factors. The Court disagrees.

1. Characteristics of the geographic area

NPCA argues that the Park Service failed to consider the "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands . . . or ecologically critical areas." *See* 40 C.F.R. § 1508.27(b)(3). NPCA acknowledges that the Park Service discussed Glacier Bay as an important marine ecosystem, protected as not only a National Park, a wilderness area, and habitat for endangered species, but also a "World Heritage Site" as designated by the United Nations. Nonetheless, NPCA argues that the Park

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[16] After reviewing the record it appears that NPCA sufficiently raised the issues pressed in its motion for summary judgment such that the Park Service's estoppel argument, should fail. *See, e.g.*, A.R. 9, 30 (Letter from Elizabeth Fayad, Counsel, National Parks & Conservation Association, to John Darnell, Chief, Division of Environmental Quality, National Park Service, Apr. 19, 1996) (setting forth NPCA's opposition to the FONSI on similar grounds to present lawsuit).

Service merely payed "lip service" to this requirement and nowhere suggest the reasoned analysis contemplated by NEPA. Unfortunately, this prong of the CEQ regulations has not been analyzed by other courts and neither the Park Service nor NPCA provide standards by which to analyze the Park Service's compliant or lack of compliance. For example, the Park Service's brief appears to beg the question by merely citing to the section of the EA which states that Glacier Bay is a unique ecosystem. However, it appears to the Court that this standard has been satisfied. The EA and VMP attempt to balance competing uses for the Park, limiting access to certain waters and curtailing access to others. While NPCA might not approve of the conclusions reached by the Park Service, it appears that the fact that the Park Service attempted to strike a balance satisfied the requirement. NPCA does not appear to have demonstrated that the Park Service failed to conduct a reasoned evaluation of the ecological importance of Glacier Bay.

2. Controversy

NPCA argue that the Park Service should have prepared an EIS because the effects of the VMP were extremely controversial. "The existence of a public controversy over the effect of an agency action is one factor in determineing whether the agency should prepare [an EIS]." *See Greenpeace Action*, 14 F.3d at 1333. *See also* 40 C.P.R. § 1508.27(b)(4). A federal action is controversial for purposes of the CEQ regulations if "a substantial dispute exists as to [its] size, nature, or effect." *See LaFlamme*, 852 F.2d at 400-01 (internal quotations and citations omitted). NPCA argues that the VMP is extremely controversial because of the extreme opposition received by the Park Service during the notice and comment period. Approximately eighty-five percent of the more than four hundred comments received by the Park Service favored decreasing access to cruise ships. *See* AR 5-7 (transcripts of public

hearing testimony, public comment logs, and letter in response to request for public comment). However, disagreements about the ultimate conclusion reached by an agency are not the sort which courts have deemed controversial under the regulation. Experience teaches that litigation of this kind lends itself to orchestrated opposition. While the agency should consider the opponents' arguments and evidence, it need not be unduly concerned with their numbers.

NPCA's arguments regarding controversy are essentially disputes with the outcome reached by the Park Service rather than with the methodology employed. As set forth in volumes seven though nine of the administrative record, which contain the written and oral comments to the proposed plans and FONSI, the objections generally are to the ultimate conclusions reached and not the means employed by the Park Service. Such opposition has been described by the Ninth Circuit not as cognizable controversy. According to the Ninth Circuit, "[c]ontroversy does not refer to the existence of opposition to a use." *See Bonneville Power Admin.*, 117 F.3d at 1536. The *Greenpeace Action* court additionally suggested that the existence of uncertainty based on a clash of expert opinions about the potential impact of proposed agency action was not enough to create a controversy for purposes of the CEQ regulations. *See* 14 F.3d at 334 n.11. While some comments also questioned the VMP's potential impacts on humpback whales and other marine creatures, the Court's review indicates that majority merely questioned the conclusions reached. The Park Service did not act arbitrarily nor capriciously in concluding that the controversy indicated by the public response challenged the ultimate conclusions reached rather than the substance of the decisions.

3. Violation of law

The CEQ guidelines require the Park Service to consider "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the

environment" in determining the intensity of the proposed action. *See* 40 C.F.R. § 1508.27(b)(10). NPCA argues that the VMP threatens the violation of the Park Service' Organic Act, the Marine Mammal Protection Act ("MMPA"), and the ESA. The Organic Act requires the Park Service to "promote and regulate" Glacier Bay so that the activities within the Park will not be impaired for future generations' enjoyment. *See* 16 U.S.C. § 1. As discussed above, humpback whales are protected by the ESA and MMPA and Steller sea lions are protected by the ESA. It does not appear that NPCA has demonstrated that the Park Service acted arbitrary and capriciously in concluding that the articulated action would not violate any law.

In arguing that the Park Service violated the Organic Act, NPCA cites to *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998). In *Southern Utah Wilderness Alliance*, the court applied the analysis set forth in *Chevron, U.S.A., Int' l v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) and ruled that a Park Service decision to allow vehicles to drive within the back country of Canyonlands National Park and Glen Canyon National Recreation Area violated the Park Service's Organic Act. According to the court, "Congress has issued a clear answer to the question of whether the Park Service is authorized to permit activities within national parks that permanently impair unique park resources. The answer is no." *See* 7 F. Supp . 2d at 1211. The *Southern Utah Wilderness Alliance* court's decision was based on its finding that the administrative record in that case demonstrated that back country vehicle traffic was "inherently and fundamentally inimical to" the continued existence of park habitat. *See id.*

Applying the same reasoning here, it appears that Plaintiffs are in an evidentiary bind. They contend that the VMP will likely harm humpback whales and other important Park resources, but that uncertainty in the record prevents them

from demonstrating that harm. They are therefore unable to demonstrate, as did the plaintiffs in *Southern Utah Wilderness Alliance*, that the Park Service acted inconsistently with Congress's clear legislative statement. While NPCA claims that whales and other protected animals may be harmed, it does not provide the evidence necessary for the court to conclude that the Park Service's conclusion to the contrary was arbitrary and capricious. As a result, Plaintiff has not met its burden of demonstrating the harm necessary for the Court to rule that the Park Service violated the Organic Act.

Similar evidentiary shortcomings harm NPCA's argument with regard to the MMPA and ESA, both of which prevent the Park Service from acting in ways that *potentially* injure or harm marine mammals. *See* 16 U.S.C. §§ 1532(19), 1362(13). In response to NPCA's argument that the Park Service has violated these acts, the Park Service asserts that NPCA has failed as a matter of law to make it case because NPCA has failed to demonstrate that harm will potentially occur. Therefore, according to the Park Service, NPCA has failed to meet the evidentiary standard necessary to prevail because it cannot conclusively demonstrate that the Park Service will violate the ESA or MMPA.

The Park Service is correct that NPCA has failed to demonstrate facts to support its contention that the proposed action will potentially harm threatened or endangered species or mammals protected by the MMPA. All NPCA has done is point to the Park Service's conclusions that such harms could conceivably occur.

VI. CONCLUSION

Decisions of the Ninth Circuit Court of Appeals have thoroughly explored the question of when an agency contemplating action that could conceivably impact the environment may rely on an EA and issue a FONSI regarding the proposed activity, and when must the agency go farther

and prepare an EIS. The cases reach different results, some requiring an EIS, some affirming the agencies' elections to proceed after EA to a FONSI. The apparent differences in result can be reconciled. The distinction in holdings seems to turn on the nature of the uncertainty found.

Where the EA does not adequately canvass the existing knowledge and exhibits insufficient awareness of the existing knowledge base, including relevant existing scientific studies, then the Ninth Circuit appears to conclude that the FONSI is based on mere speculations and an EIS must be prepared to guarantee the agency's familiarity with the existing knowledge base. Where, on the other hand, the EA thoroughly considers the existing knowledge base and thereafter reaches a conclusion based on the existing knowledge base, *i.e.*, that the evidence is inconclusive and then, based upon evidence, including expert evidence, concludes that no environmental impact has been substantiated, a FONSI will be upheld. The second situation is present here.

The EA in this case thoroughly canvasses all existing information and recognizes that theoretical harms might occur, but concludes that there is no evidence suggesting that a significant risk exists that the harms will occur. Ultimately the question comes down to whether, as a matter of policy and not procedure, cruise ship visitors to the Park should be frozen at the present level while additional studies are commissioned to add to the existing knowledge base, or whether, as the agency has determined, a modest increase in the number of visitors may be allowed while the studies are commissioned and the existing data base increased with care taken through ameliorization to recognize and eliminate problems as they arise. The Court's responsibility is to review the agency's procedures, not to dictate its policies. The decision to permit additional visitors while further studies are conducted regarding marine wildlife is one committed to the Park Service's discretion. It does not violate NEPA.

IT IS BEFORE ORDERED:

The cross-motion for summary judgment at Docket No. 49 is GRANTED. The motion for summary judgment at Docket No. 45 is DENIED. The cross-motion at Docket No. 53 is DENIED AS MOOT. The motion to strike Exhibit 4 to Plaintiff's motion for summary judgment, tracked independently at Docket No. 49, is DENIED AS MOOT. This case is dismissed with prejudice in its entirety.

Dated at Anchorage, Alaska this 23rd day of August, 1999.

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

[Filed Aug. 24, 1999]

Case No. A97-0456 CV (JKS)

NATIONAL PARKS & CONSERVATION ASSOCIATION,
Plaintiff,

vs.

BRUCE BABBITT, *et al.*,
Defendants,

and

HOLLAND-AMERICA LINE-WESTOURS,
Intervener-Defendant.

JUDGMENT IN A CIVIL CASE

___ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment is granted. *See* Docket No. 49. This case is dismissed with prejudice in its entirety.

APPROVED:

/s/ James K. Singleton, Jr.
JAMES K. SINGLETON, JR.
United States District Judge

8/23/99
Date

MICHAEL HALL
Clerk

/s/ Patricia Demeter
PATRICIA DEMETER
(By) Deputy Clerk

JUDGMENT IN A CIVIL CASE

APPENDIX F

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

[Filed Aug. 3, 2001]

Case No. A97-0456-CV (JKS)

NATIONAL PARKS & CONSERVATION ASSOC.,

vs.

GALE NORTON, *et al.*,

BEFORE THE HONORABLE: JAMES K. SINGLETON
DEPUTY CLERK/RECORDER: DENALI ELMORE
APPEARANCES:

PLAINTIFF: CATHERINE STETSON *
SCOTT REISCH *

DEFENDANT: CYNTHIA CHRISTIANSON
GREG PAGE *

* TELEPHONIC PARTICIPATION

PROCEEDINGS: *HEARING ON PLAINTIFF'S MOTION FOR 2001 SEASON INJUNCTION Held 08/03/01*:

At 2:33 p.m. court convened.

Court and counsel heard.

Oral arguments heard.

Plaintiff's Motion for 2001 Season Injunction GRANTED; injunction effective immediately.

At 3:37 p.m. court adjourned.

DATE: August 3, 2001 DEPUTY CLERK'S INITIALS: de

APPENDIX G

CODE OF FEDERAL REGULATIONS

TITLE 36—PARKS, FORESTS, AND PUBLIC PROPERTY

CHAPTER I—NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

PART 13—NATIONAL PARK SYSTEM UNITS IN ALASKA

SUBPART C—SPECIAL REGULATIONS—SPECIFIC PARK AREAS IN ALASKA

13.65 Glacier Bay National Park and Preserve.

* * *

(b) *Resource protection and vessel management*—

(1) *Definitions.* As used in this section:

Charter vessel means any motor vessel under 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) that is rated to carry up to 49 passengers, and is available for hire on an unscheduled basis; except a charter vessel used to provide a scheduled camper or kayak drop off service.

Commercial fishing vessel means any motor vessel conducting fishing activities under the appropriate commercial fishing licenses as required and defined by the State of Alaska.

Cruise ship means any motor vessel at or over 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) carrying passengers for hire.

Entry means each time a motor vessel passes the mouth of Glacier Bay into the bay; each time a private vessel activates or extends a permit; each time a motor vessel

based at or launched from Bartlett Cove leaves the dock area on the way into Glacier Bay, except a private vessel based at Bartlett Cove that is gaining access or egress to or from outside Glacier Bay; the first time a local private vessel uses a day of the seven use-day permit; or each time a motor vessel is launched from another vessel within Glacier Bay, except a motor vessel singularly launched from a permitted motor vessel and operated only while the permitted vessel remains at anchor, or a motor vessel launched and operated from a permitted motor vessel while that vessel is not under way and in accordance with a concession agreement.

Glacier Bay means all marine waters contiguous with Glacier Bay, lying north of an imaginary line between Point Gustavus and Point Carolus.

Motor vessel means any vessel, other than a seaplane, propelled or capable of being propelled by machinery (including steam), whether or not such machinery is the principal source of power, except a skiff or tender under tow or carried on board another vessel.

Operate or Operating includes the actual or constructive possession of a vessel or motor vessel.

Private vessel means any motor vessel used for recreation that is not engaged in commercial transport of passengers, commercial fishing or official government business.

Pursue means to alter the course or speed of a vessel or a seaplane in a manner that results in retaining a vessel, or a seaplane operating on the water, at a distance less than one-half nautical mile from a whale.

Speed through the water means the speed that a vessel moves through the water (which itself may be moving); as distinguished from "speed over the ground."

Tour vessel means any motor vessel under 100 tons gross (U.S. System) or 2,000 tons gross (International Convention System) that is rated to carry more than 49 passengers, or any smaller vessel that conducts tours or provides transportation at regularly scheduled times along a regularly scheduled route.

Transit means to operate a motor vessel under power and continuously so as to accomplish one-half nautical mile of littoral (i.e., along the shore) travel.

Vessel includes every type or description of craft used as a means of transportation on the water, including a buoyant device permitting or capable of free flotation and a seaplane while operating on the water.

Vessel use-day means any continuous period of time that a motor vessel is in Glacier Bay between the hours of 12 midnight on one day to 12 midnight the next day.

Whale means any humpback whale (*Megaptera novaeangliae*).

Whale waters means any portion of Glacier Bay, designated by the superintendent, having a high probability of whale occupancy, based upon recent sighting and/or past patterns of occurrence.

(2) *Permits.* The superintendent will issue permits for private motor vessels in accordance with this part and for cruise ships, tour vessels, and charter vessels in accordance with National Park Service concession authorizations and this part.

(i) *Private vessel permits and conditions.* Each private motor vessel must have a permit to enter Glacier Bay June 1 through August 31.

(A) The superintendent may establish conditions regulating how permits can be obtained, whom a vessel operator must contact when entering or leaving Glacier Bay, designated anchorages, the maximum length of stay in Glacier Bay, and other appropriate conditions.

(B) June 1 through August 31, upon entering Glacier Bay through the mouth, the operator of a private motor vessel must report directly to the Bartlett Cove Ranger Station for orientation.

(1) Failing to report as required is prohibited.

(2) The superintendent may waive this requirement before or upon entry.

(ii) *Commercial vessel permits and conditions.* Each commercially operated motor vessel must have the required permit(s) to enter Glacier Bay.

(A) To obtain or renew an entry permit, a cruise ship company must submit and, after approval, implement a pollution minimization plan. The plan must ensure, to the fullest extent possible, that any ship permitted to travel within Glacier Bay will apply the industry's best approaches toward vessel oil-spill response planning and prevention and minimization of air and underwater noise pollution while operating in Glacier Bay. The superintendent will approve or disapprove the plan.

(B) Each cruise ship company must assess the impacts of its activities on Glacier Bay resources pursuant to the NPS research, inventory and monitoring plan as specified in the applicable concession permit.

(C) The superintendent at any time may impose operating conditions to prevent or mitigate air pollution, water pollution, underwater noise pollution or other effects of cruise ship operation.

(D) The superintendent will immediately suspend the entry permit(s) of any cruise ship that fails to submit, implement or comply with a pollution minimization plan or additional operating condition.

(E) A commercial vessel, except a commercial fishing vessel, is prohibited from entering Glacier Bay unless the operator notifies the Bartlett Cove Ranger Station of the vessel's entry immediately upon entry or within the 48 hours before entry.

(F) Off-boat activity from a commercial vessel is prohibited, unless the superintendent allows it under conditions that the superintendent establishes.

(iii) *Exceptions from entry permit requirement.* A permit is not required to enter Glacier Bay when:

(A) A motor vessel is engaged in official business of the state or federal government.

(B) A private motor vessel based at Bartlett Cove is transiting between Bartlett Cove and waters outside Glacier Bay, or is operated in Bartlett Cove in waters bounded by the public and administrative docks.

(C) A motor vessel is singularly launched from a permitted motor vessel and operated only while the permitted motor vessel remains at anchor, or a motor vessel is launched and operated in accordance with a concession agreement from a permitted motor vessel while that vessel is not underway.

(D) A commercial fishing vessel otherwise permitted under all applicable authorities is actually engaged in commercial fishing within Glacier Bay.

(E) The superintendent grants a vessel safe harbor at Bartlett Cove.

(iv) *Prohibitions.*

(A) Operating a motor vessel in Glacier Bay without a required permit is prohibited.

(B) Violating a term or condition of a permit or an operating condition or restriction issued or imposed pursuant to this chapter is prohibited.

(C) The superintendent may immediately suspend or revoke a permit or deny a future permit request as a result of a violation of a provision of this chapter.

(v) *Restrictions on vessel entry.* The superintendent will allow vessel entry in accordance with the following table:

Type of vessel	Allowable vessel use days per day	Total entries allowed	Total vessel use days allowed	Period covered by limitation
Cruise ship	2	([FN1])	([FN1])	Year round.
Tour vessel	3			Year round.
Charter vessel	6	312	552	June 1-Aug. 31.
Private vessel	25	468	1,971	June 1-Aug. 31.

[1] See paragraphs (b)(2)(v)(A) through (C) of this section.

(A) By October 1, 1996, the superintendent will reinitiate consultation with the National Marine Fisheries Service (NMFS) and request a biological opinion under section 7 of the Endangered Species Act. The superintendent will request that NMFS assess and analyze any effects of vessel traffic authorized by this section, on the endangered and threatened species that occur in or use Glacier Bay National Park and Preserve.

(1) Based on this biological opinion, applicable authority, and any other relevant information, the director shall reduce the vessel entry and use levels for any or all categories of vessels in this section effective for the 1998 season or any year thereafter, if required to assure protection of the values and purposes of Glacier Bay National Park and Preserve.

(2) The director will publish a document in the FEDERAL REGISTER on any revision in the number of seasonal entries and use days under this paragraph (b)(2)(v), with an opportunity for public comment.

(B) By October 1, 1997, the superintendent will determine, with the director's approval, whether studies have been completed and sufficient scientific and other information has been developed to support an increase in cruise ship entries for the 1998 summer season (June 1 through August 31) while assuring protection of the values and purposes of Glacier Bay National Park and Preserve. Any increase will be subject to the maximum daily limit of two vessel use-days. If the superintendent recommends an increase, the superintendent will publish a document of the increase in the FEDERAL REGISTER with an opportunity for public comments.

(C) By October 1 of each year (beginning in 1998), the superintendent will determine, with the director's approval, the number of cruise ship entries for the following summer season (June 1 through August 31). This determination will be based upon available scientific and other information and applicable authorities. The number will be subject to the maximum daily limit of two vessel use-days. The superintendent will publish a document of any revision in seasonal entries in the FEDERAL REGISTER with an opportunity for public comment.

(D) Nothing in this paragraph will be construed to prevent the superintendent from taking any action at any time to assure protection of the values and purposes of Glacier Bay National Park and Preserve.

(3) *Operating restrictions.*

(i) Operating a vessel within one-quarter nautical mile of a whale is prohibited, except for a commercial fishing vessel actually trolling or setting or pulling long lines or crab pots as otherwise authorized by the superintendent.

(ii) The operator of a vessel accidentally positioned within one-quarter nautical mile of a whale shall immediately slow the vessel to ten knots or less, without shifting into reverse unless impact is likely.

The operator shall then direct or maintain the vessel on as steady a course as possible away from the whale until at least one-quarter nautical mile of separation is established. Failure to take such action is prohibited.

(iii) Pursuing or attempting to pursue a whale is prohibited.

(iv) *Whale water restrictions.*

(A) May 15 through August 31, the following Glacier Bay waters are designated as whale waters.

(1) Lower bay waters, defined as waters north of an imaginary line drawn from Point Carolus to Point Gustavus; and south of an imaginary line drawn from the northernmost point of Lars Island across the northernmost point of Strawberry Island to the point where it intersects the line that defines the Beardslee Island group, as described in paragraph (b)(3)(vii)(A)(4) of this section, and following that line south and west to the Bartlett Cove shore.

(2) [Reserved]

(B) June 1 through August 31, the following Glacier Bay waters are designated as whale waters.

(1) Whidbey Passage waters, defined as waters north of an imaginary line drawn from the northernmost point of Lars Island to the northernmost point of Strawberry Island; west of imaginary lines drawn from the northernmost point of Strawberry Island to the southernmost point of Willoughby Island, the northernmost point of Willoughby Island (proper) to the southernmost point of Francis Island, the northernmost point of Francis Island to the southernmost point of Drake Island; and south of the northernmost point of Drake Island to the northernmost point of the Marble Mountain peninsula.

(2) East Arm Entrance waters, defined as waters north of an imaginary line drawn from the southernmost point of Sebree

Island to the northernmost point of Sturgess Island, and from there to the westernmost point of the unnamed island south of Puffin Island (that comprises the south shore of North Sandy Cove); and south of an imaginary line drawn from Caroline Point across the northernmost point of Garforth Island to shore.

(3) Russell Island Passage waters, defined as waters enclosed by imaginary lines drawn from: the easternmost point of Russell Island due east to shore, and from the westernmost point of Russell Island due north to shore.

(C) The superintendent may designate temporary whale waters and impose motor vessel speed restrictions in whale waters. Maps of temporary whale waters and notice of vessel speed restrictions imposed pursuant to this paragraph (b)(3)(iv)(C) shall be made available to the public at park offices at Bartlett Cove and Juneau, Alaska, and shall be submitted to the U.S. Coast Guard for publication as a "Notice to Mariners."

(D) Violation of a whale water restriction is prohibited. The following restrictions apply in designated whale waters:

(1) Except on vessels actually fishing as otherwise authorized the superintendent or vessels operating solely under sail, while in transit, operators of motor vessels over 18 feet in length will in all cases where the width of the water permits, maintain a distance of at least one nautical mile from shore, and, in narrower areas will navigate in mid-channel: *Provided, however*, that unless other restrictions apply, operators may perpendicularly approach or land on shore (i.e., by the most direct line to shore) through designated whale waters.

(2) Motor vessel speed limits established by the superintendent pursuant to paragraph (b)(3)(iv)(C) of this section.

(v) *Speed restrictions.*

(A) May 15 through August 31, in the waters of the lower bay as defined in paragraph (b)(3)(iv)(A)(1) of this section, the following are prohibited:

(1) Operating a motor vessel at more than 20 knots speed through the water; or

(2) Operating a motor vessel at more than 10 knots speed through the water, when the superintendent has designated a maximum speed of 10 knots (due to the presence of whales).

(B) July 1 through August 31, operating a motor vessel on Johns Hopkins Inlet south of 58 degrees 54.2'N. latitude (an imaginary line running approximately due west from Jaw Point) at more than 10 knots speed through the water is prohibited.

(vi) *Closed waters, islands and other areas.* The following are prohibited:

(A) Operating a vessel or otherwise approaching within 100 yards of South Marble Island; or Flapjack Island; or any of the three small unnamed islets approximately one nautical mile southeast of Flapjack Island; or Eider Island; or Boulder Island; or Geikie Rock; or Lone Island; or the northern three-fourths of Leland Island (north of 58degrees39.1'N. latitude; or any of the four small unnamed islands located approximately one nautical mile north (one island), and 1.5 nautical miles east (three islands) of the easternmost point of Russell Island; or Graves Rocks (on the outer coast); or Cormorant Rock, or any adjacent rock, including all of the near-shore rocks located along the outer coast, for a distance of 1 1/2 nautical miles, southeast from the mouth of Lituya Bay; or the surf line along the outer coast, for a distance of 1 1/2 nautical miles northwest of the mouth of the glacial river at Cape Fairweather.

(B) Operating a vessel or otherwise approaching within 100 yards of a Steller (northern) sea lion (*Eumetopias jubatus*) hauled-out on land or a rock or a nesting seabird colony: *Provided, however*, that vessels may approach within 50

yards of that part of South Marble Island lying south of 58degrees38.6'N. latitude (approximately the southern one-half of South Marble Island) to view seabirds.

(C) May 1 through August 31, operating a vessel, or otherwise approaching within 1/4 nautical mile of, Spider Island or any of the four small islets lying immediately west of Spider Island.

(D) May 1 through August 31, operating a cruise ship on Johns Hopkins Inlet waters south of 58degrees54.2'N. latitude (an imaginary line running approximately due west from Jaw Point).

(E) May 1 through June 30, operating a vessel or a seaplane on Johns Hopkins Inlet waters south of 58degrees54.2'N. latitude (an imaginary line running approximately due west from Jaw Point).

(F) July 1 through August 31, operating a vessel or a seaplane on Johns Hopkins Inlet waters south of 58degrees54.2'N. latitude (an imaginary line running approximately due west from Jaw Point), within 1/4 nautical mile of a seal hauled out on ice; except when safe navigation requires, and then with due care to maintain the 1/4 nautical mile distance from concentrations of seals.

(G) Restrictions imposed in this paragraph (b)(3)(vi) are minimum distances. Park visitors are advised that protection of park wildlife may require that visitors maintain greater distances from wildlife. See, 36 CFR 2.2 (Wildlife protection).

(vii) *Closed waters, motor vessels and seaplanes.*

(A) May 1 through September 15, operating a motor vessel or a seaplane on the following water is prohibited:

(1) Adams Inlet, east of 135degrees59.2'W. longitude (an imaginary line running approximately due north and south through the charted (5) obstruction located approximately 2 1/4 nautical miles east of Pt. George).

(2) Rendu Inlet, north of the wilderness boundary at the mouth of the inlet.

(3) Hugh Miller complex, including Scidmore Bay and Charpentier Inlet, west of the wilderness boundary at the mouth of the Hugh Miller Inlet.

(4) Waters within the Beardslee Island group (except the Beardslee Entrance), that is defined by an imaginary line running due west from shore to the easternmost point of Lester Island, then along the south shore of Lester Island to its western end, then to the southernmost point of Young Island, then north along the west shore and east along the north shore of Young Island to its northernmost point, then at a bearing of 15degrees true to an imaginary point located one nautical mile due east of the easternmost point of Strawberry Island, then at a bearing of 345degrees true to the northernmost point of Flapjack Island, then at a bearing of 81degrees true to the northernmost point of the unnamed island immediately to the east of Flapjack Island, then southeasterly to the northernmost point of the next unnamed island, then southeasterly along the (Beartrack Cove) shore of that island to its easternmost point, then due east to shore.

(B) June 1 through July 15, operating a motor vessel or a seaplane on the waters of Muir Inlet north of 59degrees02.7'N. latitude (an imaginary line running approximately due west from the point of land on the east shore approximately 1 nautical mile north of the McBride Glacier) is prohibited.

(C) July 16 through August 31, operating a motor vessel or a seaplane on the waters of Wachusett Inlet west of 136 degrees 12.0'W longitude (an imaginary line running approximately due north from the point of land on the south shore of Wachusett Inlet approximately 2 1/4 nautical miles west of Rowlee Point) is prohibited.

(viii) *Noise restrictions*. June 1 through August 31, except on vessels in transit or as otherwise permitted

by the superintendent, the use of generators or other non-propulsive motors (except a windless) is prohibited from 10:00 p.m. until 6:00 a.m. in Reid Inlet, Blue Mouse Cove and North Sandy Cove.

(ix) *Other restrictions.* Notwithstanding any other provision of this part, due to the rapidly emerging and changing ecosystems of, and for the protection of wildlife in Glacier Bay National Park and Preserve, including but not limited to whales, seals, sea lions, nesting birds and molting waterfowl.

(A) Pursuant to §§ 1.5 and 1.6 of this chapter, the superintendent may establish, designate, implement and enforce restrictions and public use limits and terminate such restrictions and public use limits.

(B) The public shall be notified of restrictions or public use limits imposed under this paragraph (b)(3)(ix) and the termination or relaxation of such, in accordance with § 1.7 of this chapter, and by submission to the U.S. Coast Guard for publication as a "Notice to Mariners," where appropriate.

(C) The superintendent shall make rules for the safe and equitable use of Bartlett Cove waters and for park docks. The public shall be notified of these rules by the posting of a sign or a copy of the rules at the dock. Failure to obey a sign or posted rule is prohibited.

(x) Closed waters and islands within Glacier Bay as described in paragraphs (b)(3)(iv) through (vii) of this section are described as depicted on NOAA Chart #17318 GLACIER BAY (4th Ed., Mar. 6/93) available to the public at park offices at Bartlett Cove and Juneau, Alaska.

(xi) Paragraphs (b)(3)(i) through (iii) of this section do not apply to a vessel being used in connection with federally permitted whale research or monitoring; other closures and restrictions in this paragraph (b)(3) do not

apply to authorized persons conducting emergency or law enforcement operations, research or resource management, park administration/supply, or other necessary patrols.

(4) *Marine vessel visible emission standards.* Visible emissions from a marine vessel, excluding condensed water vapor, may not result in a reduction of visibility through the exhaust effluent of greater than 20 percent for a period or periods aggregating more than:

(i) Three minutes in any one hour while underway, at berth, or at anchor; or

(ii) Six minutes in any one hour during initial startup of diesel-driven vessels; or

(iii) 12 minutes in one hour while anchoring, berthing, getting underway or maneuvering in Bartlett Cove.

* * *

(7) The information collection requirements contained in paragraph (b)(3) of this section have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1024-0016. The information is being collected to allow the superintendent to issue permits to allow vessels into Glacier Bay during the whale season. This information will be used to grant administrative benefits.

Note: The 1999 amendments to 36 C.F.R. § 13.65(b) set forth in 64 Fed. Reg. 56,463 (1999) are omitted.

Supreme Court, U.S.
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No. 01-456

In the Supreme Court of the United States

HOLLAND AMERICA LINE-WESTOURS, INC.,
PETITIONER

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The court of appeals ruled that the National Park Service violated the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, by failing to prepare an environmental impact statement concerning its decision to increase the number of vessels permitted to enter Glacier Bay National Park and Preserve. The question presented is whether the court of appeals' instruction that the district court enter an injunction requiring the Park Service to rescind the increase in vessel entries pending the completion of an environmental impact statement is inconsistent with this Court's rulings in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), or otherwise unlawful.

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In the Supreme Court of the United States

No. 01-456

HOLLAND AMERICA LINE-WESTOURS, INC.,
PETITIONER

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 241 F.3d 722. The order of the district court (Pet. App. 35a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2001 (Pet. App. 32a-33a). A petition for rehearing was denied on May 18, 2001 (Pet. App. 34a). On August 8, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including September 15, 2001, and the petition was

filed on September 17, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 42 U.S.C. 4321 *et seq.*, directs federal agencies to prepare a detailed statement, known as an environmental impact statement (EIS), when undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). The National Parks and Conservation Association (NPCA), a nonprofit organization, challenged the decision of the Department of the Interior's National Park Service not to prepare an environmental impact statement when developing its Vessel Management Plan (VMP) for cruise ships and other vessels in Glacier Bay National Park and Preserve. The district court granted the federal respondents' motion for summary judgment and dismissed the case. Pet. App. 35a-72a. The court of appeals reversed that decision and directed the district court to enter an injunction enjoining the Park Service from increasing the number of vessel entries allowed, beyond the number allowed in 1996, pending the Park Service's completion of an EIS. Since the filing of the petition for a writ of certiorari, Congress has enacted legislation stating that "the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year." See Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 130, 115 Stat. 442.

1. Glacier Bay National Park and Preserve, administered by the Department of the Interior's National Park Service, embraces 5000 square miles in southeastern Alaska, including 940 square miles of land and

more than 600 miles of shoreline. The Park "contains one of the world's largest protected marine areas," and its ecosystem is "unique * * * in the National Park System." C.A. Excerpts of Record (ER) 31, 82. It is "a major tourist destination where watercraft provide primary access to features of interest," and cruise ship passengers account for nearly 80 percent of Park visitors. ER 31, 104, 108. The Park is home to two species of marine mammals that are listed under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.* They are the humpback whale, an endangered species, and the Steller sea lion, a threatened species. In addition, the Park provides habitat for other marine mammals and for 300 to 500 species of fish.

2. NEPA is a procedural statute intended to promote environmentally informed decision-making by federal agencies. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87 (1983); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978). Section 102(2)(C) requires federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" (known as an environmental impact statement (EIS)) addressing, among other things, the environmental impact of and alternatives to the proposed action. 42 U.S.C. 4332(2)(C). NEPA injects environmental considerations into the federal agency's decision-making process and informs the public that the agency has considered environmental concerns in that process. See *Andrus* v. *Sierra Club*, 442 U.S. 347, 350-351 (1979); *Inland Empire Pub. Lands Council* v. *United States Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996).

NEPA does not require agencies to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980). Rather than mandating "particular results," the statute "simply prescribes the necessary process" to ensure that federal agencies will take a "hard look" at environmental consequences. *Methow Valley*, 490 U.S. at 350; see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Methow Valley*, 490 U.S. at 350. "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive.'" *Stryker's Bay*, 444 U.S. at 227.

An agency's compliance with NEPA is guided by regulations promulgated by the Council on Environmental Quality (CEQ). See 40 C.F.R. 1500.1 *et seq.* The regulations provide for the preparation of "environmental assessments" (EAs), which are "concise" documents that "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact [(FONSI)]." 40 C.F.R. 1508.9(a)(1). An EIS is not required if the agency concludes in an EA and FONSI that the proposed action will not have a significant effect on the environment. *Ibid.*; 40 C.F.R. 1508.13. "[A]n agency may condition its decision not to prepare a full EIS on adoption of mitigation measures." *City of Auburn* v. *United States*, 154 F.3d 1025, 1033 (9th Cir. 1998).

3. In 1979, the National Marine Fisheries Service (NMFS) issued a biological opinion pursuant to Section 7 of the ESA, 16 U.S.C. 1536, concluding that uncontrolled increases in vessel traffic had likely altered the behavior of humpback whales within Glacier Bay National Park. ER 37-38, 152-153. Accordingly, in 1980, the Park Service promulgated regulations restricting vessel traffic in the Park. ER 146 (45 Fed. Reg. 32,228 (1980)). The 1980 regulations established a quota of 89 cruise ships in the Park during the summer whale season, with not more than two entries per day, and imposed various operating restrictions to minimize impacts on whales. ER 146.[1]

Later in the 1980s, after further study and renewed ESA consultation with NMFS, the Park Service increased the cruise ship quota to 107 entries. ER 31, 38-39, 146-147. In 1990, in response to demand for greater public access to the Park, the Park Service reviewed the vessel management regulations and commenced an environmental assessment under NEPA. See ER 31, 42-48. The agency considered various management options, including a proposal to increase the seasonal cruise ship quota by 74 percent to 184 entries annually and, at the same time, to adopt additional measures to protect natural resources in the Park. ER 67, 71-72, 77. The Park Service once again consulted with NMFS under the ESA. ER 157, 169, 175.

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[1] The regulations were promulgated pursuant to the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, which authorizes the Secretary of the Interior to adopt "such rules and regulations as he may deem necessary or proper for the use and management of the parks * * * under the jurisdiction" of the National Park Service, including "regulations concerning boating and other activities on or relating to waters located within areas of the National Park System." 16 U.S.C. 3, 1a-2(h).

After holding public hearings and reviewing public comments, the Park Service decided to increase cruise ship quotas by 30 percent over existing levels for the 1996 and 1997 seasons, with the potential for a further increase of up to the previously proposed 184 seasonal entries no earlier than 1998 and "contingent upon the completion of studies demonstrating that a further increase in cruise ship traffic would be consistent with protection of the values and purposes" of the Park. ER 250. Entry quotas for charter boats were increased by eight percent, and entries for private vessels were increased by fifteen percent. ER 247. Daily limits for all types of vessels remained unchanged. *Ibid.* The final Vessel Management Plan (VMP) included a variety of new measures to mitigate adverse environmental impacts, including closures of specific areas of the Park to vessels, expanding the "whale waters" in which stringent controls on vessel operations are imposed, and specific measures to protect particular species and prevent pollution. ER 253. See 61 Fed. Reg. 27,010 (1996).

The Park Service acknowledged that the impacts of the new VMP on whale distribution and certain other environmental effects could not be known with certainty. While some "short term displacement * * * may occur at increased levels" as a result of the VMP, predictions about overall whale use of the Park were "highly speculative." ER 260. The Park Service noted that "[p]redictions about humpback whale use of Glacier Bay and the contribution of this group of whales to total humpback whale numbers in Southeast Alaska are highly speculative due to the degree of uncertainty associated with factors such as prey availability." ER 119. As a result, the agency noted that "[f]ollow-up research and monitoring" would be "essential," and it

accordingly adopted an extensive program calling for such research. ER 260. The Park Service also noted that the mitigation measures "would reduce the risk of whale/vessel interactions and the level of potential effects on individual whales." *Ibid.*

The Park Service acknowledged that possible adverse effects on other resources within Glacier Bay National Park were possible, but it noted that the magnitude of those effects was unknown. ER 119. The Park Service determined that its proposed increases to the vessel quotas, combined with the new mitigation measures, could be "implemented with no significant adverse effect to natural and cultural resources as documented by the environmental assessment." ER 248. After receiving further public comment, the Park Service issued its final regulations implementing the plan, see 61 Fed. Reg. at 27,008 (ER 280-288), which are codified at 16 C.F.R. 13.65(b).

4. Respondent NPCA filed this action in May 1997, alleging that the Park Service's environmental review of the new VMP violated NEPA and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See ER 292 (complaint). NPCA alleged that "because the new VMP 'will or may' have significant environmental effects, it is a major federal action significantly affecting the quality of the human environment that necessitates the preparation of an EIS." ER 305. Petitioner Holland American Line-Westours, a cruise ship company that conducts tours that include Glacier Bay National Park, intervened as a defendant.

On cross-motions for summary judgment, the district court granted judgment for the federal respondents. The court noted that the parties "agree[d]" that, "despite extensive study," the effects of the VMP on the Park, and particularly on its humpback whale and

other marine mammal populations, "cannot be conclusively established." ER 320. See also ER 325 (noting parties' agreement that "uncertainty exists in the record"). The court concluded, however, that, in the circumstances presented, the acknowledged uncertainty did not require the preparation of an EIS because the uncertainty stemmed from a "genuine lack of scientific consensus on the subject," not from a want of diligent examination by the agency. Pet. App. 55a (citing *Greenpeace Action* v. *Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1993)). The court observed that the Park Service had "thoroughly consider[ed] the existing knowledge base" concerning the impacts in question and had permissibly reached a finding of no significant impact. ER 335.

5. The court of appeals reversed. That court pointed to statements in the environmental analysis describing the effects of the proposed increase in vessel entries on Park resources as "unknown," Pet. App. 8a-10a, 16a, and concluded that the Park Service had impermissibly failed to gather information that, in the court's view, "may be obtainable and that * * * would be of substantial assistance in the evaluation of the environmental impact of the planned vessel increase." *Id.* at 17a. The court of appeals regarded the research initiatives set forth in the EA as an illegitimate decision to "increase the risk of harm to the environment and then perform its studies." *Ibid.* (citation omitted). The court stated that the Park Service's "lack of knowledge does not excuse the preparation of an EIS; rather it requires the Parks Service [*sic*] to do the necessary work to obtain it." *Id.* at 18a. The court of appeals concluded that the Park Service had not adequately explained why more complete information was not available. *Id.* at 19a. In a similar vein, the court stated

that "[n]o new scientific developments are required in order to obtain the requisite information," because "[t]he passage of cruise ships through Glacier Bay is not a new development." *Id.* at 23a.

For similar reasons, the court of appeals held that the mitigation measures adopted by the Park Service failed to support the Park Service's conclusion that the vessel quota increases would not significantly affect the environment. Pet. App. 22a (citing *Greenpeace Action*, 14 F.3d at 1332). The court found that there was a "paucity of analytic data" supporting the Park Service's conclusion, *id.* at 20a, and it observed that the agency had not definitively concluded that particular measures would eliminate potential adverse impacts, *id.* at 20a-22a.[2]

On the question of remedy, the court of appeals noted that, under *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), and its own precedent, an injunction would not issue automatically upon the finding of a NEPA violation, but would require an equitable balancing of harms. Pet. App. 26a. The court nevertheless noted that, by its nature, "'[e]nvironmental injury * * * is often * * * irreparable.'" *Ibid.* (quoting *Village of Gambell*, 480 U.S. at 545). The court of appeals concluded that an injunction was warranted in this case because an EIS had been found to be necessary, and "allowing a potentially environmentally damaging project to proceed" prior to preparing an EIS would be contrary to the purpose of NEPA's EIS requirement.

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[2] The court of appeals concluded that "controversy" surrounding the impacts of the new VMP, see 40 C.F.R. 1508.27(b)(4), also supported the conclusion that an EIS was required. Pet. App. 23a-26a. The court pointed to the fact that the Park Service "received 450 comments on the VMP, approximately 85% of which opposed" the version ultimately adopted. *Id.* at 24a-25a.

Id. at 27a. In response to petitioner's argument that tourists who had booked cruises in the expectation of visiting Glacier Bay would be harmed, the court concluded that the company had been on notice of the possibility of an injunction in this lawsuit and that its objection "fails to tilt the balance of harms in its favor." *Id.* at 28a.

The court of appeals directed the district court, on remand, "to enjoin the further increases in vessel traffic, and to return traffic levels to their pre-1996 levels." Pet. App. 29a. The court left in place other aspects of the VMP, including the expanded "whale waters" plan and other measures to protect the environment. *Ibid.* Noting that the injunction could affect previously booked tours, the court instructed the district court "to decide upon the effective date of the injunction * * *, and, specifically, to decide in its informed discretion, and on the basis of any evidence that may be presented, whether the injunction should take effect prior to the conclusion of this year's cruising season, sometime this September [2001]." *Id.* at 30a.

The federal respondents filed a petition for rehearing arguing that the panel's merits ruling was erroneous and that, in any event, the court should have remanded the case for the district court to determine based on evidence whether an injunction was warranted.[3] The

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[3] In particular, the federal respondents argued that (1) under Ninth Circuit precedent, the mere existence of uncertainty about environmental impacts did not preclude a FONSI where the agency had taken a hard look at the existing data; (2) the Park Service's mitigation measures were a reasonable response to the uncertainties in the record; (3) the existence of public comments opposing the new VMP did not alone render the environmental impacts "highly controversial" or mandate that an EIS be prepared; and (4) the court of appeals, rather than itself ordering an

panel denied that petition without comment. It also denied a petition for rehearing en banc filed by petitioners.

ARGUMENT

Petitioner asserts that the court of appeals' decision holding that an injunction is warranted in this case is inconsistent with the decisions of this Court and of other courts of appeals. That court's decision, however, has not produced a genuine conflict over the legal standards governing the exercise of equitable relief in NEPA cases. The court of appeals identified the proper legal test, and its application of that test turned on the court's assessment of particular facts in the administrative record. Although the court of appeals' decision was erroneous, this Court's review is not warranted, particularly in light of recent congressional action that, as a practical matter, has mooted the question of the appropriate interim remedy.

1. Petitioner's principal submission is that the court of appeals' decision is inconsistent with this Court's teachings in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), that, in the absence of clear evidence that Congress intended to confine the courts' equitable discretion, an injunction does not issue automatically for a violation of an environmental statute, but instead depends upon a traditional balancing of the equities.

In *Romero-Barcelo*, a district court determined that the Navy had violated the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, by dis-

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injunction, should have remanded the case to the district court to determine whether injunctive relief was appropriate.

charging ordnance into navigable waters without a permit. That court additionally found that the violation had not actually harmed water quality and accordingly declined to enjoin the Navy's activities while it sought the requisite permit. 456 U.S. at 309-310. The court of appeals, however, ordered the district court to issue an injunction. This Court reversed, holding that nothing in the FWPCA demonstrated congressional intent "to deny courts their traditional equitable discretion in enforcing the statute." *Id.* at 316. The court concluded that Congress, instead, had meant to "permit[] the district court to order that relief it considers necessary to secure prompt compliance with the Act." *Id.* at 320.

In *Village of Gambell*, the court of appeals had directed the district court to enter a preliminary injunction against oil exploration activities under oil leases issued by the Department of the Interior based on the agency's violation of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.*, which required the agency to consider the impact of its actions on subsistence resources. The court of appeals reasoned that "irreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action." 480 U.S. at 544-545 (quoting court of appeals' decision, 774 F.2d 1414, 1423 (9th Cir. 1985)) (emphasis added by this Court). Relying on *Romero-Barcelo*, this Court reversed, ruling that the Ninth Circuit's presumption of irreparable harm was "contrary to traditional equitable principles and has no basis in ANILCA." *Village of Gambell*, 480 U.S. at 545. The Court noted that the environment could be "fully protected" through the application of traditional equitable balancing and did not demand the presumption of irreparable harm adopted by the Ninth Circuit:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Ibid. The Court concluded that, in the circumstances presented, the equities weighed against an injunction in light of the absence of environmental harm and the high costs that an injunction would impose on the government's lessees. *Ibid.*

Petitioners assert that the court of appeals' decision conflicts with *Romero-Barcelo* and *Village of Gambell* because the court adopted a "presumption of irreparable harm" that "forecloses the full balancing of the equities which is required for issuance of an injunction." Pet. 19. However, the court of appeals expressly stated that its choice of remedy was to be guided by "traditional balance of harms analysis." Pet. App. 26a. See also *id.* at 27a n.18 ("We have fully weighed the competing interests using our traditional equitable jurisdiction, and conclude that injunctive relief is appropriate."). In that respect, there is no conflict between the legal standard elaborated by the court of appeals and this Court's decisions.

The court of appeals acknowledged that, like the environmental statutes at issue in *Romero-Barcelo* and *Village of Gambell*, NEPA does not displace the district courts' traditionally broad and flexible equitable powers. Pet. App. 26a; see *Northern Cheyenne Tribe* v. *Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988). That conclusion is correct: NEPA does not impose a specific remedial standard that would displace a court's equita-

ble powers; indeed, the statute nowhere addresses judicial enforcement.[4] Other circuits have likewise concluded that NEPA remedies are governed by traditional principles of equity. *E.g.*, *Charter Townhship of Huron* v. *Richards*, 997 F. 2d 1168, 1175 (6th Cir. 1993); *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *Town of Huntington* v. *Marsh*, 884 F.2d 648, 651 (2d Cir. 1989); *Sierra Club* v. *Marsh*, 872 F.2d 497, 502-504 (1st Cir. 1989); *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988).

Petitioner nonetheless contends (Pet. 18-20) that the court of appeals proceeded to undermine any apparent adherence to traditional equitable balancing by apply-

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[4] Actions for judicial review of agencies' compliance with NEPA are governed by the review provisions of the APA, 5 U.S.C. 701 *et seq.* See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 90 (1983). The APA directs the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," and to "hold unlawful and set aside agency action, findings, and conclusions" found to be unsupported or contrary to law. 5 U.S.C. 706(1) and (2). Like NEPA itself, the APA does not require a court to issue an injunction for a violation and leaves intact courts' traditional power to devise equitable remedies for unlawful agency action. To the contrary, the APA's provision governing interim relief affirms traditional equitable standards on injunctions. See 5 U.S.C. 705 ("On such conditions as may be required and *to the extent necessary to prevent irreparable injury*, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.") (emphasis added); United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 106 (1947) ("irreparable injury, the historic condition of equity jurisdiction, is the indispensable condition to the exercise of the power conferred by [5 U.S.C. 705] upon reviewing courts").

ing a "presumption" of irreparable harm. Although we agree with petitioner that the court of appeals should have remanded the case to the district court for a hearing on the appropriate remedy, we do not believe the court applied a "presumption" of irreparable harm. Cf. *Village of Gambell*, 480 U.S. at 545. As evidence that the court applied such a presumption, petitioner emphasizes the court of appeals' statement, in a footnote, that withholding or limiting injunctive relief in a NEPA case is appropriate in "'unusual circumstances.'" Pet. App. 27a n.18 (quoting *Forest Conservation Council* v. *United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995)). Petitioner suggests that this phrase demonstrates that the court "foreclose[d] the full balancing of the equities." Pet. 19. The court of appeals' decision, however, does not support that contention.

The court stated that it "fully weighed the competing interests using our traditional equitable jurisdiction." Pet. App. 27a n.18. Moreover, the court's reference to "unusual circumstances" does not necessarily conflict with the equitable balancing adopted in *Romero-Barcelo* and *Village of Gambell*. There appears to be little substantial difference between the court of appeals' "unusual circumstances" formulation and this Court's observations in *Village of Gambell* that "[e]nvironmental injury * * * can seldom be adequately remedied by money damages" and that an equitable balancing of harms will "usually" favor an injunction when such an injury is "sufficiently likely." 480 U.S. at 545.

The court of appeals reviewed the administrative record and made a judgment based on the record that "there is a sufficient possibility of environmental harm" to warrant an injunction. Pet. App. 27a. The court

specifically concluded that a "significant adverse impact on the environment * * * might result from implementation of the VMP," *id.* at 26a; that the VMP was "potentially environmentally damaging," *id.* at 27a, and that "[k]ittiwakes, murrelet, eagles, sea otters, seals, sea lions, porpoises, and killer and minke whales, as well as the better known humpbacks, are affected," *ibid.* Thus, the court evidently was of the view that evidence of harm sufficient to support an injunction could be found in the administrative record itself.[5]

While we do not agree with the court's conclusion in that regard, the court's decision ultimately rested on a factual judgment about the magnitude of the environmental risks set forth in the administrative record. That judgment, although certainly subject to question, does not present a question warranting this Court's review. The court's decision should not be read to announce a legal standard under which irreparable harm to the environment is presumed from the mere fact of a NEPA violation.

2. Petitioner argues that the court of appeals' decision "irreconcilably conflicts" with decisions of other courts of appeals (and "even some Ninth Circuit precedent") because the court based its injunction on mere "speculative allegations of harm." Pet. 22-23. Petitioner, however, fails to demonstrate a clear conflict

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[5] Petitioner also reads too much into the court of appeals' discussion in *Forest Conservation Council* v. *United States Forest Service*, 66 F.3d 1489 (9th Cir. 1995). See Pet. 21. In that case, the court cited the discussion of Ninth Circuit NEPA law in *Village of Gambell* not as support for a presumption of irreparable harm, but instead as support for the proposition that interference with a "long-term contractual relationship" would be a factor weighing against a NEPA injunction, which the court noted could not issue "automatically." 66 F.3d at 1496.

among the courts of appeals over the types of harms sufficient to justify an injunction under NEPA.

Petitioner asserts that the court of appeals' decision conflicts with decisions of the Second Circuit, including *Town of Huntington* v. *Marsh*, 884 F.2d 648 (2d Cir. 1989), and *New York* v. *Nuclear Regulatory Comm'n*, 550 F. 2d 745 (2d Cir. 1977). But there is no demonstrable conflict warranting this Court's review. In *Town of Huntington*, the court of appeals vacated an injunction barring dumping of dredged materials because there was insufficient evidence of any danger to the environment, noting that "a threat of irreparable injury must be proved, not assumed." 884 F.2d at 653. In *New York*, the court of appeals affirmed the denial of a preliminary injunction against transport of nuclear materials where the record showed that the materials had been transported "without accident over a period of 25 years" and the likelihood of an accident was "infinitesimally small." 550 F.2d at 754.

The court of appeals in this case did not articulate any legal standard that conflicts with those decisions, and it did not espouse any rule of law that "speculative" harms may support a NEPA injunction. Rather, it determined that the alleged environmental risks posed by an increase in vessel traffic in Glacier Bay were sufficient to warrant an injunction. That factbound judgment does not warrant this Court's review.

Petitioner also suggests (Pet. 24-25) that the court of appeals misread the First Circuit's decision in *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989) (Breyer, J.). In *Sierra Club*, the court of appeals examined NEPA's procedural role in government decision-making and concluded that violation of NEPA procedures can cause "real environmental harm * * * through inadequate foresight and planning," a harm that may be considered

in the balancing of equities under *Village of Gambell*. *Id.* at 504. In particular, the court in *Sierra Club* referred to the danger that decision-makers may be unwilling to conduct a thorough examination of alternatives if they have already taken steps to implement a preferred policy. *Id.* at 503-504. The court noted that that type of harm is a "harm to the *environment*, not merely to a legalistic 'procedure.'" *Id.* at 504 (emphasis in original).

The court of appeals in this case cited *Sierra Club* in a footnote for the proposition that "because NEPA is a purely procedural statute, the requisite harm is the failure to follow the appropriate procedures." Pet. App. 27a n.18. The court added that the decision in *Sierra Club* also justifies injunctive relief in this case. *Ibid.* The court of appeals, however, did not fully describe the rationale of *Sierra Club*, which is based upon an increased risk of environmental harm (not purely procedural harm) resulting from a lack of informed decisionmaking. Furthermore, as petitioner observes (Pet. 25), it is doubtful whether the effect described in *Sierra Club* is a serious concern in the context of the Park Service's VMP, which is not a physical structure that involves significant sunk costs.

In any event, the court of appeals' brief mention of *Sierra Club* does not provide a basis for this Court's review. The court of appeals cited the *Sierra Club* only in passing as an "additional" basis for its decision, and, as noted, the court determined that the agency action here did pose a substantial risk of actual environmental harm warranting an injunction. The court did not hold that a violation of NEPA alone would justify an injunction.

3. Petitioner contends (Pet. 26-28) that the Court should grant certiorari to review the appropriate

procedures for determining whether injunctive relief is warranted in NEPA cases. Petitioner points out that the courts in the present case never allowed an opportunity for an evidentiary hearing on remedy and that both courts confined their review of evidence to materials from the administrative record, despite the existence of information concerning the VMP's impacts since its adoption.

We share petitioner's misgivings regarding the procedures that the court of appeals followed in this case. That court should have remanded the case to the district court and allowed it to evaluate the balance of hardships in light of the substantial amount of new information available since the VMP's adoption in 1996. Nevertheless, the court of appeals' particular remedial actions in this case do not present a matter warranting this Court's review. That conclusion is particularly true in light of legislative developments since the court of appeals' decision.

On November 5, 2001, President Bush signed the Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414. Section 130 of the Act states:

> From within funds available to the National Park Service, such sums as may be necessary shall be used for expenses necessary to complete and issue, no later than January 1, 2004, an Environmental Impact Statement (EIS) to identify and analyze the possible effects of the 1996 increases in the number of vessel entries issued for Glacier Bay National Park and Preserve: Provided, That such EIS, upon its completion, shall be used by the Secretary to set the maximum level of vessel entries: *Provided further, That until the Secretary sets the level of*

> *vessel entries based on the new EIS, the number of vessel entries into the Park shall be the same as that in effect during the 2000 calendar year and the National Park Service approval of modified Alternative 5 and promulgation of the final rule issued on May 30, 1996, relating to vessel entries, including the number of such entries, for Glacier Bay National Park and Preserve are hereby approved and shall be in effect notwithstanding any other provision of law until the Secretary sets the maximum level of vessel entries consistent with this section*: Provided further, That nothing in this section shall preclude the Secretary from suspending or revoking any vessel entry if the Secretary determines that it is necessary to protect Park resources.

115 Stat. 442 (emphasis added). Section 130 has the practical effect of restoring the status quo respecting the permissible number of vessel entries by allowing the same number that the Park Service had allowed before the court of appeals' decision. As a consequence, there is no need for this Court to grant review to correct the court of appeals' mistaken actions in directing the district court to issue an injunction limiting the number of vessel entries into Glacier Bay pending completion of the EIS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 01-456

IN THE

Supreme Court of the United States

HOLLAND AMERICA LINE-WESTOURS, INC.,
Petitioner,

v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari is warranted to review a decision of the court of appeals enjoining an ongoing violation of the National Environmental Protection Act, when the court employed the traditional balancing test endorsed by this Court in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), fully weighed the parties' interests and evidence for and against an injunction, and concluded that injunctive relief was appropriate.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondent National Parks Conservation Association (formerly National Parks and Conservation Association), a nonprofit citizens' organization dedicated to protecting, preserving, and enhancing the National Park System, was the plaintiff-appellant below.

Petitioner Holland America Line-Westours intervened below in support of defendants Department of the Interior and the Director of the National Park Service.

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HOLLAND AMERICA LINE-WESTOURS, INC.,
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v.

NATIONAL PARKS AND CONSERVATION ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Respondent National Parks Conservation Association (NPCA) hereby opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

This case meets none of the criteria warranting certiorari. *See* S. Ct. R. 10. The decision below does not conflict with a case decided by this Court, or by any of the Courts of Appeals. It does not present any unsettled issue of federal law. What it does present is a commonplace, fact-bound application of this Court's decision in *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531 (1987), to the particular

facts of this National Environmental Protection Act (NEPA) case.

COUNTERSTATEMENT

Statutory Background. The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, established a national policy to "prevent or eliminate damage to the environment and biosphere." 42 U.S.C. § 4321. To fulfill its "broad national commitment to protecting and promoting environmental quality," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989), NEPA directs federal agencies, "to the fullest extent possible," to prepare a detailed Environmental Impact Statement (EIS) before commencing any "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332, § 4332(2)(C).[1] An EIS must set forth, among other things, the "environmental impact of the proposed action;" "any adverse environmental effects which cannot be avoided should the proposal be implemented;" and possible "alternatives to the proposed action." *Id.* § 4332(2)(C)(i)-(iii); *see also Kleppe* v. *Sierra Club*, 427 U.S. 390, 399-400 (1976).

Not every federal action requires an Environmental Impact Statement; if an action will *not* "significantly affect[ ]" the environment, no EIS is necessary. Agencies considering whether to prepare an EIS often prepare "Environmental Assessments," or EAs, to determine whether the impact of a proposed action warrants preparation of a full EIS. *See* 40 C.F.R. § 1508.9; *Weinberger* v. *Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 n.1 (1981). An Environmental Assessment is a "less formal" document than an EIS, *US Ecology, Inc.* v. *United States Dep't of Interior*, 231 F.3d 20, 22 (D.C. Cir. 2000), designed to "provide[] sufficient evidence and analysis for determining whether to

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[1] "Affecting means will *or may* have an effect on." 40 C.F.R. § 1508.3 (emphasis added). The "human environment" is interpreted "comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14.

prepare an EIS or a finding of no significant impact." *Blue Mountains Biodiversity Project* v. *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999). When an agency prepares an Environmental Assessment and it appears that the "determination that a significant impact will or will not result from the proposed action is a close call, an EIS should be prepared." *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 13 (2d Cir. 1997) (citing cases). If, on the other hand, an agency "decides that no environmental impact statement is required because the proposed action will not have a significant impact," *North Carolina* v. *FAA*, 957 F.2d 1125, 1128 (4th Cir. 1992), the agency reports its decision in a "finding of no significant impact," or FONSI. 40 C.F.R. § 1508.9; *see* 42 U.S.C. § 4332(2)(C).

NEPA's procedures are designed to fulfill NEPA's animating purpose—to "ensure[ ] that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). By requiring an agency to assess the degree of harm to the environment before it embarks on a course of action that could adversely affect the environment, NEPA ensures that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson*, 490 U.S. at 349. NEPA's "look-before-you-leap" provisions also are designed to inform the general public, "guarantee[ing] that the relevant information will be made available to the larger audience." *Id.* The Act thus "insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug." *Sierra Club* v. *United States Army Corps of Eng'rs*, 772 F.2d 1043, 1049 (2d Cir. 1985).

The Park and the Bay. Glacier Bay National Park and Preserve (the "Park") spans over three million acres of Alaska's coast, stretching northward from Alaska's inside passage to the Alsek River and encircling the massive saltwater bay that gives the Park its name. Glacier Bay

encompasses a fjord system extending more than sixty miles inland; four of its fjords contain actively calving glaciers. Pet. App. 3a. The Park has long been recognized as one of our Nation's most unique treasures, from the early voyages of the explorer George Vancouver in 1794, to 1879, when naturalist John Muir first traveled to Glacier Bay, through today.[2] The largest protected marine ecosystem in the National Park system, the Park is host to a vast assemblage of "wildlife species of inestimable value." Pet. App. 1a. Over two hundred species of fish, including the harbor porpoise and the Minke whale, swim in its waters; dozens of species of seabirds nest within Glacier Bay and along its outer coast; and harbor seals and sea otters colonize the Bay. The Steller sea lion, listed as an endangered species under the Endangered Species Act, *id.* 3a n.1, feeds extensively in the Bay. Among the Bay's most unique species is the humpback whale, one of the most endangered baleen whale populations in the world. The humpback was placed on the endangered species list in 1973, but population recovery has been slow; the entire North Pacific population of humpback whales is estimated to hover between 1,500 and 2,100. *Id.* 3a; Ct. App. E.R. 85.

The Vessel Management Plan. The Park's geographic contours are such that Glacier Bay provides the primary means of access to the rest of the Park. Pet. App. 4a. An array of vessels, from massive cruise ships to small privately-owned boats, access the Bay, particularly during the summer season. In the late 1970s, in response to a decline in the local humpback whale population, the Park Service began regulating vessel entries into the Park by placing quotas on the number of cruise ships, tour boats, charter vessels, and private boats entering the Bay. *Id.* 5a.

The Park Service publishes its vessel quotas in "Vessel Management Plans." The Vessel Management Plan prior to the one at issue here, promulgated in 1984, provided for a

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[2] *See* John Muir, *Travels In Alaska*, ch. XI ("The Discovery of Glacier Bay") ("The view down the bay among the islands was, I thought, the finest of this kind of scenery that I had yet observed").

twenty-percent increase in vessel traffic to be implemented over four years, from 1984 to 1988. Between 1988 and 1994, the number of vessels entering the Park held steady. Because of larger cruise ships, however, the number of passengers visiting the park increased substantially, rising 144 percent from 1980 to 1994.

In the early 1990s, the tourism industry began lobbying for an increase in cruise ship entry quotas in Glacier Bay. Ct. App. E.R. 31. In May 1995, the Park Service sought public comment on a new Vessel Management Plan containing several proposed alternatives to the then-existing Park vessel restrictions. The alternatives ranged from a "no-action" approach, *e.g.*, maintaining vessel quotas at current levels, to decreasing vessel entries, to increasing seasonal cruise ship entries by 72 percent. The Park Service identified the last alternative—the 72 percent increase—as the one it preferred. Pet. App. 8a.

The Park Service received hundreds of written comments on its proposal. Approximately 85 percent of the comments opposed it, and the vast majority of commenters favored the proposal reducing the number of vessel entries to the Park. *Id.* NPCA participated in the administrative proceedings. *Id.*

In March 1996, the Park Service announced that it had selected a modified version of its 72-percent-increase proposal as the new Vessel Management Plan. 61 Fed. Reg. 11,428 (Mar. 20, 1996). Under the new Plan, the summer seasonal cruise ship quota was immediately increased by 30 percent over 1995 levels for 1996 and 1997, and could increase 72 percent above 1995 levels thereafter, contingent upon specified circumstances. With its announcement, the Park Service issued a "Finding of No Significant Impact," or FONSI, announcing its conclusion that the new Vessel Management Plan did not "constitute a major federal action significantly affecting the quality of the human environment." Ct. App. E.R. 249.

Notwithstanding the Park Service's definitive finding of "no significant impact," the Environmental Assessment

accompanying the FONSI showed that the impact of the Plan on Park resources was in fact *unknown*. The Park Service acknowledged, among other things, that the number of collisions between whales and vessels could increase; however "the degree of increase is unknown," and that "[t]he degree to which disturbance and displacement would affect the humpback whale populations in Glacier Bay is unknown." Pet. App. 9a. The Park Service had much the same to say about the Plan's potential impacts on other wildlife in the harbor, including the endangered Steller sea lion. Among other things, the Park Service conceded that that "[l]ittle is known about the effects of the disturbance" on the sea lion, id. 8a; that the "effect of increased levels of disturbance" on cetacean populations was "unknown," *id.* 9a; that "little is known about the effects of the disturbance" on the harbor seal; that it was "unknown whether populations of marbled murrelets and Kittilitz murrelets would change" with an increase in vessel traffic; that the "overall effect on bald eagle populations is unknown;" that "[i]t is unknown if waterfowl populations would change under this alternative;" and that "[t]he biological effects of * * * air pollutants from stack emissions are unknown." *Id.* 9a-10a (emphases added).

Despite all these *unknown* impacts—and many more not enumerated here—the Park Service issued a "finding of *no significant* impact." *Id.* 10a.

Following the FONSI, the NPCA submitted further comments to the Park Service, pointing out that a finding of *no* significant impact based on *unknown* effects frustrates NEPA's animating purpose of ensuring that the agency take a "hard look" at the environmental consequences of a proposed action before action is taken. *See id.*; *id.* 12a. But in May 1996, the Park Service adopted, with minor changes, its new Vessel Management Plan for Glacier Bay. 61 Fed. Reg. 27,008 (May 30, 1996), *codified at* 36 C.F.R. § 13.65(b).

Proceedings Below. Following the Park Service's "finding of no significant impact" and adoption of the Vessel Management Plan, the NPCA filed suit against the Director of the National Park Service and the Secretary of the Inte-

rior—the official responsible for the activities of the Department of Interior in managing the National Park Service. Pet. App. 10a-11a. NPCA alleged in its complaint that defendants had violated the Administrative Procedure Act (APA) and NEPA by issuing a finding of no significant impact, and thus refusing to prepare an Environmental Impact Statement, when the impacts of the Park Service's proposed action on Glacier Bay were concededly not known. NPCA's request for relief sought an injunction against the 1996 Vessel Management Plan—thus returning vessel entries to the pre-1996 levels—until a full EIS was prepared. *Id.* 11a. Westours, a cruise ship operator, intervened as a defendant in the proceedings. *Id.*

The parties filed motions for summary judgment. Although the district court acknowledged that " 'the effects cruise ship operations have on Glacier Bay National Park and the animals that live there are unknown,' " and that the EA " 'contains a long list of uncertainties about the potential effects of increased vessel traffic,' " it nonetheless concluded that the Park Service was not required to prepare an EIS. *Id.* (quoting district court opinion).

NPCA appealed.[3] The Ninth Circuit reversed. The court of appeals unanimously held that the Park Service had violated NEPA when it failed to prepare an EIS in the face of its repeated conclusions that the effects of a vessel increase on Glacier Bay were largely unknown. Pet. App. 15a-23a. Noting that the Park Service had proposed a "park research and monitoring program" to study the effects of vessel traffic

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[3] Petitioner states that in responding to NPCA's appeal, it asked the court to remand the issue of injunctive relief to the district court for a hearing, and that NPCA "*likewise* asked the court of appeals to remand the question of injunctive relief to the district court." Pet. 9 (emphasis added). Its characterization of NPCA's request for relief is quite misleading. In its opening brief and again on reply, NPCA asked the court of appeals to "reverse the District Court and remand the case with instructions to enjoin further implementation of the 1996 Vessel Management Plan until a full Environmental Impact Statement is prepared." NPCA Br. at 57; NPCA Reply at 30. That is what the Ninth Circuit did.

on the Park's wildlife and air and water quality, the court of appeals observed that "[t]hat is precisely the information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be prepared in this case." *Id.* 17a (emphasis in original). Nor, the court concluded, did the mitigating measures proposed by the Park Service relieve the Service from its obligations under NEPA; its "speculative and conclusory statements" about the efficacy of such measures were "insufficient to demonstrate that the * * * measures would render the environmental impact so minor as to not warrant an EIS." *Id.* 22a.[4]

The court of appeals next turned to NPCA's request for injunctive relief, applying the "traditional balance of harms analysis" long used to determine the appropriateness of an injunction. *Id.* 26a. At the outset of its discussion, the court of appeals quoted from this Court's decision in *Amoco Production Co.* v. *Gambell*, noting that " '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.' " *Id.* (quoting *Amoco*, 480 U.S. at 545). The court concluded that "NPCA has made the requisite showing for injunctive relief." Pet. App. 26a. As it held, an EIS was required to explore the environmental consequences of the Park Service's Vessel Management Plan. Where an EIS was required, the court concluded, "allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement." *Id.* 27a.

The court of appeals next examined the purported harm to the defendants from entry of an injunction. The government had asserted no such harm on appeal. Westours, for its part,

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[4] The court of appeals also held that the Vessel Management Plan was sufficiently controversial to warrant preparation of an EIS. *See* 40 C.F.R. § 1508.27(b)(4) (agency must consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" in determining whether to prepare an EIS). Pet. App. 23a-26a.

argued that the potential lost revenues it might suffer if the Plan was enjoined outweighed the potential damage to the environment from keeping the Plan in place. The court of appeals rejected that argument, concluding that the potential financial harm to Westours from a decrease in its allotted entries "fails to tilt the balance of harms in its favor."[5] *Id.* 28a. The Ninth Circuit also considered and rejected evidence Westours submitted on appeal purporting to show that the humpback whale population had remained stable over the short term, noting that the evidence "completely fail[ed] to address the other environmental effects at issue here." *Id.* at 28a-29a.

The court of appeals noted that in some "unusual circumstances," it might opt to withhold an injunction in a NEPA case or to limit its scope. *Id.* 27a n.18. Those circumstances were not present here, the court concluded; accordingly, having "fully weighed the competing interests using [its] traditional equitable jurisdiction," as this Court directed in *Amoco*, the Ninth Circuit concluded that "injunctive relief is appropriate." *Id.*

The Ninth Circuit also held that it was appropriate for it to decide the appropriate scope of relief at the appeal stage. There were no "intensely factual questions" that warranted sending the case back to the district court to determine the proper scope of the injunction; rather, "the scope of the injunction to which NPCA is entitled is quite plain." *Id.* 29a. The court of appeals accordingly directed the district court to enjoin the increases in vessel traffic under the 1996 Vessel Management Plan (while leaving in place its mitigating measures, as the government suggested), and to return vessel traffic "to its pre-1996 levels." *Id.* Recognizing that its procedures for rehearing could delay the return of the case

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[5] In addition, observing that NPCA first sought an injunction against the plan five years before the Ninth Circuit's decision, the Ninth Circuit stated that "neither Westours nor those of its passengers who may be unable to view Glacier Bay at the time they originally planned have cause to claim surprise as a result of any injunction." *Id.* 28a.

to the district court, the court of appeals left the exact timing of the injunction open on remand, "leav[ing] it to the district court to decide upon the effective date of the injunction * * * and specifically, to decide in its informed discretion * * * whether the injunction should take effect prior to the completion of this year's cruising season." *Id.* 30a.

The government and Westours sought rehearing and rehearing *en banc*. Their petitions were denied without dissent. *Id.* 34a.

On remand, after briefing and argument, the district court ruled from the bench that the Park Service and Westours had not advanced sufficient evidence of harm to their operations to warrant postponing the injunction until next cruise season. It ordered the injunction to issue effective immediately. Pet. App. 73a.[6]

Westours, the intervenor below, has now petitioned for certiorari. The Department of Interior and the Director of the National Park Service—the defendants below—have not.

REASONS FOR DENYING THE WRIT

Westours does not challenge the Ninth Circuit's determination that the Park Service violated NEPA when it failed to prepare an Environmental Impact Statement before approving a substantial increase in vessel traffic into Glacier Bay. Westours contends only that the court of appeals "significantly relax[ed] the standards in the Ninth Circuit for obtaining injunctive relief in environmental cases." Pet. 14. That is wrong. The decision of the court of appeals was a routine, fact-bound weighing of the evidence for and against an injunction in this NEPA case. The court of appeals's decision does not conflict with—indeed, it repeatedly quoted from—the relevant decisions of this Court. The decision

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[6] On November 5, 2001, a Department of Interior appropriations bill was enacted with a rider purporting to preserve vessel entries at 1996 levels until an EIS is completed. Pub. L. No. 107-63, § 130, 115 Stat. 414.

does not conflict with that of any other court of appeals. It presents no compelling issue of federal law. And it is also correct.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

This Court observed in *Amoco Production Co.* v. *Village of Gambell* that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." 480 U.S. at 545. The Court cautioned, however, that courts reviewing requests for injunctions in environmental cases must still engage in the traditional balance of harms test before ordering that an injunction issue. *Id.* at 544 (rejecting argument that irreparable harm is "presumed" when an agency fails to evaluate the environmental impact of its proposed action); *see Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982) (injunctive relief does not issue as a matter of course in environmental litigation, but, as in other litigation, issues after the court engages in a balancing of harms and concludes that an injunction is appropriate).

That is exactly what the Ninth Circuit did in this case. The court of appeals "fully weighed" the factors in favor of and against an injunction. Pet. App. 27a n.18. It concluded that environmental injury was likely, and it found that the balance of harms favored an injunction. *Id.* 27a-28a. [7] The court of appeals acknowledged—just as the Court implicitly did in

[7] Although Westours challenges the standards for granting injunctive relief that the court of appeals used, Pet. 16-25, and the procedures the court followed, *id.* 26-28, Westours is careful not to challenge the Ninth Circuit's underlying conclusion—that environmental harm was sufficiently likely to warrant an injunction. Westours' careful circumvention of that crucial issue is understandable; that wholly fact-bound conclusion is even less appropriate for certiorari treatment than the issues raised in the rest of its petition.

Amoco—that in some "unusual" cases, an injunction might not issue in response to potential environmental injury. *Id.* 27a n.18; *see Amoco*, 480 U.S. at 545 (noting that in cases where environmental injury is alleged and "sufficiently likely," "the balance of harms will *usually* favor the issuance of an injunction") (emphasis added). The Ninth Circuit concluded, however, that those unusual circumstances were not present in this case, and that an injunction was warranted. Pet. App. 27a n.18.[8]

From the court's elementary application of *Amoco* and the traditional equitable factors used in analyzing a motion for injunctive relief, Westours has cooked up an argument that the Ninth Circuit actually "significantly relax[ed]" its standards for injunctive relief. Pet. 14. According to Westours, the decision of the court of appeals adopted a "rule" that absent "unusual circumstances," courts "must enjoin governmentally authorized" (but illegal) activity "whenever a NEPA violation likely exists." *Id.* Westours further posits that the Ninth Circuit's decision did away with the "traditional balancing of equities" endorsed by this Court in *Amoco* and other rulings. *Id.*; *see also id.* at 21-22.

The Ninth Circuit did no such thing. The court in fact repeatedly stated that it was engaging in the "traditional balance of harms analysis" used in actions for injunctive relief. *See, e.g.*, Pet. App. 26a; *id.* 27a n.18. The Ninth Circuit also expressly followed this Court's lead in *Amoco*, in which this Court stated that the "usual[]" remedy for likely environmental injury was an injunction. 480 U.S. at 545. The court of appeals concluded that such injury was likely, in

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[8] Petitioner suggests that the Ninth Circuit's statement that an injunction will not issue in "unusual" circumstances, is equivalent to the rebuttable presumption found invalid in *Amoco*. That is not correct. It may well be unusual (as this Court implicitly noted in *Amoco*) for an injunction not to issue on a finding of a NEPA violation, but if the facts support such a ruling, the injunction can be denied. That is a far cry from a rebuttable presumption of an injunction in environmental cases, which—prior to *Amoco*—attached no matter what the individual facts.

light of the substantial increase in vessel traffic and the conceded impacts of that traffic on Glacier Bay's wildlife and air and water quality. *See* Pet. App. 26a-27a, 30a. It issued an injunction. That is the end of the story. The Ninth Circuit's decision in no way conflicts with *Amoco* or with *Romero-Barcelo*. Westours' portrayal of the Ninth Circuit's commonplace inquiry as a "[r]enegade" reshaping of the standards for injunctive relief, Pet. 20, is pure fiction.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL

Westours next takes aim at the Ninth Circuit's purported "misread[ing]" of the First Circuit opinion in *Sierra Club* v. *Marsh*, 872 F.2d 497 (1st Cir. 1989). Writing for the court of appeals in that case, then-Judge Breyer observed that " 'when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.' NEPA in this sense differs from substantive environmental statutes." *Id.* at 500 (quoting *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). As the *Marsh* court recognized, "the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis * * * of the likely effects of their decision upon the environment." *Id.* (emphasis in original).

The Ninth Circuit in this case referred to *Marsh* in a footnote, noting that its reasoning "also justifies injunctive relief in this case," separate and apart from the Ninth Circuit's weighing of the factors for and against injunctive relief. Pet. App. 27a n.18. Westours seizes on the Ninth Circuit's alternative ruling. It devotes several pages of its petition to arguing that the court of appeals read *Marsh* to justify injunctive relief *whenever* a NEPA violation occurs, and suggests that its reading of *Marsh* has generated an "irreconcilable" circuit conflict. Pet. 22-25. The Ninth Circuit did

not misread *Marsh*; that court's reasoning supports exactly what the Ninth Circuit did in this case. The Ninth Circuit's reading of *Marsh* is also beside the point, because its footnoted reference was expressly made separate from its determination, employing the traditional balance of harms test, that injunctive relief was appropriate in this case. *See* Pet. App. 26a-29a (applying traditional balance of harms analysis); *id.* 27a & n.18 (noting, after concluding that "injunctive relief is appropriate," that *Marsh* "*also* justifies injunctive relief in this case") (emphasis added).

Nor does the Ninth Circuit's decision conflict with any other decision from any other court of appeals. Westours' petition singles out cases from the Second and (oddly) Ninth Circuits in which the courts declined to issue an injunction for putative violations of NEPA. *See* Pet. 23. The courts in those cases engaged in the same balancing of harms as the Ninth Circuit panel did here. They just reached different results based on the different facts and circumstances presented in those cases. Courts of appeal uniformly acknowledge what this Court recognized in *Amoco*: when environmental harm is sufficiently likely—and the Ninth Circuit so found here—injunctive relief is appropriate. *See, e.g.*, *Town of Huntington* v. *Marsh*, 884 F.2d 648, 651 (2d Cir. 1989) (noting that "injunctive relief has been used when appropriate for violations of NEPA," and citing *Amoco*), *cert. denied*, 494 U.S. 1004 (1990); *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988) (affirming injunction for NEPA violation and citing *Amoco*), *overruled on other grounds by Marsh* v. *Oregon Natural Resources Council*, 490 U.S. at 377.

III. THIS CASE INVOLVES NO UNSETTLED ISSUE OF NATIONAL IMPORTANCE

This case, in which the Ninth Circuit simply engaged in the traditional balancing of harms and found an injunction appropriate, plainly does not present a compelling and

unsettled issue of federal law warranting review. The federal government apparently agrees, having decided not to seek certiorari itself.

Westours itself implicitly recognizes the limits of its argument that this case is deserving of certiorari. Westours points out in its petition that when the district court enjoined the Park Service from implementing the 1996 Vessel Management Plan for the remainder of the season, "five cruise ships operated by petitioner which had been scheduled to call on Glacier Bay" had to sail elsewhere. Pet. 3. Next year, if the injunction is in place for the full cruise season, presumably about three times that number—fifteen Westours ships—will visit ports of call other than Glacier Bay. That hardly presents an "extremely important question" warranting Supreme Court intervention. Pet. 26. Westours also opines that, unless this Court grants certiorari, "a single party will be able to halt fishing and logging management, road construction, and a host of other activities authorized by the government, by filing a NEPA action and seeking an injunction." Pet. 15. That is exactly why NEPA was enacted; it ensures that the government reckons with the consequences of its major proposals before acting on them, and enables interested parties to compel the government to engage in the NEPA process if it fails to do so on its own. Westours' complaint that "a single party" should not be able to stop ongoing violations of the environmental laws should be taken up with Congress, not this Court.

Finally, Westours suggests that litigants are confused about the procedures for seeking and defending against injunctive relief in NEPA cases. Westours' last-ditch suggestion that this case presents an appropriate vehicle to "establish[] the proper standards and procedure for injunctions in NEPA cases" is ill-founded. Pet. 28. The procedures for obtaining injunctive relief are and have been plain.[9] The Ninth Cir-

[9] Petitioner suggests that NPCA was required to *demonstrate* irreparable environmental harm from the activities it sought to

cuit's ruling was adverse to Westours. That does not make its procedure suspect.

IV. THE DECISION BELOW WAS CORRECT

Finally, the Ninth Circuit's decision was correct. The Park Service issued its Vessel Management Plan in the face of a host of unknowns about the harmful effects of the plan and without benefit of a full EIS. The court of appeals concluded that the Plan presented a sufficient likelihood of harm to endangered humpback whales, endangered sea lions, myriad other species in the Park, and the Park's air and water quality, to warrant an injunction. Pet. App. 26a-29a. It properly directed the district court to enter that injunction, having concluded that the scope of the injunction to which NPCA was entitled was "quite plain."[10] *Id.* 29a; *see also Citizen*

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enjoin. Pet. 24-25. That is incorrect, as the courts of appeal have recognized. To require a plaintiff to demonstrate that an agency action undertaken in violation of NEPA "*will* have particular environmental effects" would be to require a plaintiff to "conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (emphasis in original); *see Sierra Club* v. *Hodel*, 848 F.2d at 1097 (court applied traditional balancing test in NEPA case, found harm impossible to assess before NEPA studies completed, and granted injunction). As the *Coleman* court explained, "[c]ompliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS." 521 F.2d at 671.

[10] Westours argues in passing that the court of appeals should have remanded the case to the district court for a further hearing on injunctive relief. Pet. 27 & n.16. The court of appeals correctly concluded that there was no need. Pet. App. 29a. The Ninth Circuit fully considered and rejected petitioner's allegations of harm, (the government having made no such allegations on appeal), as well as the extra-record evidence petitioner submitted on appeal regarding the purported short-term increase in humpback whale numbers. *See* Pet. App. 28a-29a (concluding that Westours' "evidence fails to tilt the balance of harms in its favor").

Advocates for Responsible Expansion, Inc. v. *Dole*, 770 F.2d 423, 443 (5th Cir. 1985) (granting injunctive relief at appellate stage for NEPA violation, and citing cases). The decision of the court of appeals was an appropriate and proper response to the ongoing NEPA violation and the serious threat to the Park it presented.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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